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No. 489.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

BALTIMORE & OHIO RAILROAD COMPANY, et al.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

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THE UNITED STATES OF AMERICA, et al.,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This case comes here on appeal from the decree of the District Court for the Northern District of Illinois, without opinion, dismissing the bill of complaint of the Baltimore & Ohio Railroad Company, Chicago, Indianapolis & Louisville Railway Company; Chicago & Erie Railroad Company; Grand Trunk Western Railway Company; the Pennsylvania Railroad Company; and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, brought to enjoin an order of the Interstate Commerce Commission dated May 16, 1922, in Finance Docket 1165 and to set aside all acts performed by the corporate defendants, New York Central Railroad Company, The Chicago River & Indiana Railroad Company;

the Chicago Junction Railway Company; the Chicago Junction Railways and Union Stock Yards Company; and the individual defendant, Richard Fitzgerald, under said order, and to restore the *status quo* of May 15, 1922.

The order of the Commission, the invalidity of which is alleged by the bill of complaint was entered by the Commission upon the application of the New York Central Railroad Company (hereinafter called the Central) filed December 28, 1920, copy of the said application being attached to the bill of complaint and marked Exhibit 3, seeking authority and a certificate of public convenience and necessity (a) permitting the applicant to purchase the capital stock of the Chicago River & Indiana Railroad Company, hereinafter referred to as the River Road, for $750,000; (b) permitting the River Road to lease the properties, owned and leased, of the Chicago Junction Railway Company, hereinafter referred to as the Junction, for 99 years, renewable at the option of the lessee in perpetuity at an annual rental of $2,000,000; and (c) authorizing an option to the applicant or its nominee at any time during the term of said lease to purchase all of the capital stock or properties of the Junction for the sum of $33,333,333.

The application filed by the Central asked for a certificate of convenience and necessity under paragraphs 18 to 20 of Section 1 and for authority under paragraph 2 of Section 5 of the Interstate Commerce Act. No application was filed by any parties other than the Central. The application was docketed by the Commission as Finance Docket 1165.

Plaintiffs at the first hearing, April 5, 1921, filed their intervening petition (Paragraph VII of Bill of Complaint, Rec., 6), in opposition to the application, and were made parties to said proceeding.

After full hearing the Commission made its report (71 I. C. C. 631) and entered its order * of May 16, 1922, authorizing the Central to acquire control of the River Road by purchasing its capital stock at a price not exceeding $750,000 and the River Road to acquire control of all of the properties of the Junction under a lease for a term of 99 years, renewable at the option of the lessee in perpetuity at an annual rental of $2,000,000. On May 29, 1922, plaintiffs filed a petition for modification of the report and order and for a reversal of the Commission's finding and order on the grounds set forth in Exhibit 2. (Rec., 34.) Said petition was denied by the Commission June 12, 1922.

The application of the Central stated that the same was filed pursuant to the provisions of Paragraphs 18 to 20, inclusive, of Section 1, and paragraph 2 of Section 5 of the Interstate Commerce Act. Said paragraphs 18 to 20, inclusive, provide as follows:

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act

* "IT IS ORDERED, That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.

IT IS FURTHUR ORDERED, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized." (Rec., 33.)

shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.

From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in inter-

> est; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Paragraph 2 of Section 5 of the Interstate Commerce Act provides as follows:

> "(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

The Commission issued no certificate of convenience and necessity such as was prayed for under Section 1 of the Interstate Commerce Act, but with four commissioners dissenting, issued a report (Rec., 15) which purports to be a finding that the acquisition by the Central of the control of the River Road by the purchase of stock and the acquisition by the River Road of control of the Junction under a lease, will be in the public interest, subject to the observance of 17 conditions. The order, entered by the Commission, of which the report was made a part, approved and authorized the said acquisition.

The bill of complaint was filed in the District Court for the Northern District of Illinois, alleging the invalidity of the order of the Commission as being in excess of the authority conferred by law upon the Commission, and as being wholly without evidence in support thereof.

The relief sought by the bill of complaint was an injunction (a) setting aside the order of the Commission, and (b) requiring the defendants to set aside and vacate all acts taken in accordance with the authority granted by the Commission's order and to restore the *status quo* of May 15, 1922.

All the defendants filed motions to dismiss. (Rec., 40, 41, 44 and 47.)

The case came on for hearing before Baker, Circuit Judge, and Carpenter and Wilkerson, District Judges, upon the motions to dismiss and upon the application for a temporary injunction. The court entered a decree denying the motion for preliminary injunction and dismissing the bill of complaint. (Rec., 143.) To reverse that decree the case comes here on appeal.

Under Section X of the bill of complaint, paragraphs 4 to 7, inclusive, it is alleged that the order of the Commission is unlawful and void because the record upon which the order was based contains no evidence either that present or future public convenience and necessity requires, or will require, the acquisition of the Junction Roads by the Central, and no evidence that acquisition by the Central of control of the River Road by purchase of stock and acquisition by the River Road of control of the Junction by lease will be in the public interest. On the contrary, it is alleged that the record before the Commission contains evidence which clearly shows that acquisition of the River Road and the Junction by the Central as authorized by the Commission is, and will be, con-

trary to present or future public convenience and necessity and contrary to public interest and to a sound public policy. On motion to dismiss these allegations stand admitted. On the present state of the record, the validity of these grounds upon which it is urged that the order is unlawful and void, cannot be determined by this court. An examination of the evidence before the Commission is necessary to a determination of these particular grounds of invalidity. If the decree of the District Court is reversed and further proceedings are necessary, it will be clearly shown from the record before the Commission that not only was there no evidence upon which the Commission could find that acquisition of control authorized by the Commission's order would further public convenience and necessity, or be in the public interest; but on the contrary, it will be clearly shown from the evidence before the Commission that the acquisition authorized was contrary to public interest and to a sound public policy, and that instead of serving public convenience and necessity the necessities and convenience of the public have been seriously injured. While little is said in this brief on the question of public interest, it should be clearly understood that the plaintiffs in no wise abandon their contention that there was no evidence upon which the Commission could base its report and order.

ASSIGNMENTS OF ERROR.

The assignments of error are as follows:

1. The court erred in denying the motion of the plaintiffs for an interlocutory injunction.

2. The court erred in granting the motions to dismiss the bill of complaint, as amended.

3. The court erred in dismissing plaintiffs' bill of complaint, as amended, at the plaintiffs' cost.

The questions of law which we think are properly presented under the foregoing assignments are:

1. Plaintiffs may properly bring this suit.

2. Plaintiffs are properly joined as parties.

3. The order complained of is affirmative and is properly within the jurisdiction of this court.

4. The bill is not multifarious.

5. Plaintiffs have not been guilty of laches in filing the bill.

6. Courts will enjoin an order of the commission if the same is unlawful in any respect.

7. The order of the Commission is not a certificate of public convenience and necessity.

8. Acquisition of control (a) by the Central of the River Road by purchase of stock; and (b) by the River Road of the Junction by lease, involves a consolidation of the Central, River Road and the Junction Road into a single system for ownership and operation; authorization of such acquisition of control is beyond the power of the Commission.

9. The order of the Commission is void if it authorizes the consolidation of the properties of the River Road and the Junction Road into a single corporation in violation of Paragraph (6) of Section 5, because the Commission had not (has not yet) perfected its general plan of consolidation.

10. The order is void insofar as it permits the River Road to lease the properties of the Junction, because neither the River Road nor the Junction Road made any application to the Commission for the authorization contained in the order.

11. The order of the Commission is not a specific finding that the acquisition by the Central of the River Road and Junction Road will be in the public interest.

12. The order of the Commission is void because it does not specify the date upon which the same shall become effective.

13. The order is void insofar as it approves and authorizes the leasing of the Junction properties, owned and leased, to the River Road, because no lease executed by the parties had (has yet) been submitted to and been approved by the Commission.

BRIEF OF ARGUMENT.

I.

Plaintiffs may properly bring this suit.

(a) THE VENUE IS PROPERLY LAID.

District Court Jurisdiction Act, 38 Stat. L. 219.

Commerce Court Act, Sec. 1, 36 Stat. L. 539.

(b) PLAINTIFFS ARE PROPER PARTIES AND HAVE SUCH AN INTEREST IN THE ORDER OF THE COMMISSION AS TO ENTITLE THEM TO MAINTAIN THIS SUIT.

Commerce Court Act. 36 Stat. L. 539.

Elkins Act, Sec. 2, 32 Stat. L. 847.

Detroit & M. R. Co. v. *Boyne City G. & A. R. Co.*, 286 Fed. 540.

F. H. Peavey & Co. et al. v. *Union Pacific Co.*, 176 Fed. 409; affirmed 222 U. S. 42, 49; 56 L. Ed. 83-88.

Edward Hines, Yellow Pine Trustees et al. v. *United States et al.*, No. 91, decided Nov. 12, 1923.

The Atlantic Coast Line R. Co. et al. v. *Interstate Commerce Commission*, 194 Fed. 449.

McLean Lumber Co. v. *United States*, 237 Fed. 460.

Duplex Printing Press Co. v. *Deering*, 254 U. S. 443; 65 L. Ed. 349.

American Steel Foundries v. *Tri-City Central Trades Council et al.*, 257 U. S. 184, 66 L. Ed. 189.

International Railway Co. v. *Davidson*, 257 U. S. 506, 66 L. Ed. 341.

Raritan & Delaware Bay Railroad Co. et al. v. *Delaware & Raritan Canal et al.*, 18 N. J. Eq. 546.

Memphis Street Railway Co. v. *Rapid Transit Co.* (Tenn.), 179 S. W. 635, P. U. R. 1916-A, 834.

Brooklyn City R. R. Co. v. *Whalen*, 191 App. Div. 737, 182 N. Y. Supp. 283.

People ex rel. The New York Central & H. R. Co. v. *Public Service Com.*, 195 N. Y. 157.

People ex rel. New York Edison Co. v. *Willcox*, 207 N. Y. 86.

Conway v. *Taylor*, 66 U. S. 603, 17 L. Ed. 191.

Town of East Hartford v. *Hartford Bridge Co.*, 10 How. 511, 13 L. Ed. 518.

Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394.

Bartlesville Electric Light & Power Co. v. *Bartlesville Interurban Ry. Co.*, 29 L. R. A. 77.

Consolidation of Railroads, 63 I. C. C. 455.

II.

Plaintiffs are properly joined as parties.

Elkins Act, 32 Stat. L. 847.

Equity Rule No. 37.

Philadelphia & Reading Ry. Co. v. *Laurel Coal Mining Co.*, 276 Fed. 1019.

Goldfield Consolidated Mining Co. v. *Richards*, 194 Fed. 198.

Risley et al. v. *City of Utica et al.*, 173 Fed. 502.

III.

The order complained of is affirmative and is properly within the jurisdiction of this court.

Commerce Court Act, 36 Stat. L. 539.

Procter & Gamble Co. v. *United States et al.*, 225 U. S. 282, 56 L. Ed. 1091.

Intermountain Rate Case, 234 U. S. 476, 58 L. Ed. 1408.

Tap Line Cases, 209 Fed. 244; affirmed in 234 U. S. 1, 58 L. Ed. 1185.

Skinner & Eddy Corp. v. *U. S.*, 249 U. S. 557, 63 L. Ed. 772.

McLean Lumber Co. v. *United States*, 237 Fed. 460.

IV.

The bill is not multifarious.

Shields v. *Thomas*, 18 How. 253, 15 L. Ed. 368.

United States v. *Union Pacific*, 160 U. S. 1, 40 L. Ed. 319.

Chicago, Milwaukee & St. Paul Ry. Co. v. *U. S.*, 244 U. S. 351, 61 L. Ed. 1184.

Edmund F. Gaines et ux. v. *Chew*, 2 How. 619, 11 L. Ed. 402.

Tap Line Cases, 209 Fed. 244.

United States v. *Union Pacific*, 226 U. S. 61, 57 L. Ed. 124.

V.

Plaintiffs have not been guilty of laches in filing the bill.

Halstead v. *Grinnan*, 152 U. S. 412, 38 L. Ed. 495.

United States v. *Southern Pacific Co.*, 259 U. S. 214, 66 L. Ed. 907.

VI.

Courts will enjoin an order of the Commission if the same is unlawful in any respect.

Interstate Commerce Commission v. *Union Pacific*, 222 U. S. 541, 56 L. Ed. 309.

Interstate Commerce Commission v. *Northern Pacific R. Co.*, 216 U. S. 538, 54 L. Ed. 608.

VII.

The order of the Commission is not a certificate of convenience and necessity.

Interstate Commerce Act, par. 18 of Sec. 1, par. 2 of Sec. 5, 41 Stat. L. 476, 480.

Finance Docket 2919, *Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company* (not yet reported).

VIII.

Acquisition of control (a) by the Central of the River Road by purchase of stock; and (b) by the River Road of the Junction by lease, involves a consolidation of the Central, River Road and the Junction into a single system for ownership and operation; authorization of such acquisition of control is beyond the power of the Commission.

(a) THE APPLICATION FILED WITH THE COMMISSION SHOWS THE PURPOSE TO MAKE THE JUNCTION AND RIVER ROAD A PART OF THE SYSTEM KNOWN AS THE NEW YORK CENTRAL LINES.

(b) THE JUNCTION AND RIVER ROAD HAVE BEEN OPERATED ALONG WITH OTHER CARRIERS CONSTITUTING THE NEW YORK CENTRAL LINES, UNDER A COMMON CONTROL AND MANAGEMENT AS A SINGLE SYSTEM.

(c) THE PHRASE "NOT INVOLVING THE CONSOLIDATION OF SUCH CARRIERS INTO A SINGLE SYSTEM FOR OWNERSHIP AND OPERATION" APPLIES ALIKE TO CONTROL (1) UNDER A LEASE; (2) BY THE PURCHASE OF STOCK; (3) IN ANY OTHER MANNER.

Interstate Commerce Act, par. 2 of Sec. 5, 41 Stat. L. 480.

Securities Application of Pittsburgh & West Virginia Railway, 76 I. C. C. 663.

Coxson v. *Doland*, 2 Daly 66.

State ex rel. Crow v. *St. Louis*, 174 Missouri 125, 61 L. R. A. 593, 73 S. W. 623.

(d) CONSOLIDATION IS ANY FORM OF UNION OR COMBINATION WHEREBY A SINGLE CONTROL IS EXERCISED OVER PROPERTIES EACH OF WHICH WAS THERETOFORE SUBJECT TO DIFFERENT CONTROL.

United States v. *St. Paul, Minneapolis & Manitoba Railway Co. et al.*, 247 U. S. 310, 62 L. Ed. 1130.

In the Matter of the Application of Pittsburgh & West Virginia Railway Company, 70 I. C. C. 682.

Consolidation of Railroads, 63 I. C. C. 455.

Merger of Subsidiary Companies with Boston & Maine, 76 I. C. C. 797.

In the Matter of the Application of the Western Pacific Railway Company for Authority to Acquire Control of the Sacramento Northern Railroad and to Purchase Its Bonds, 71 I. C. C. 653.

Control of Central Pacific by Southern Pacific, 76 I. C. C. 508.

E. St. Louis Connecting Railway Co. et al. v. *Jarvis*, 92 Fed. 735.

United States v. *Southern Pacific Co. et al.*, 239 Fed. 998.

Same case, reversed, 259 U. S. 214, 66 L. Ed. 907.

Northern Securities Case, 193 U. S. 197, 48 L. Ed. 679.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minneapolis Civic and Commerce Assn.*, 247 U. S. 490, 62 L. Ed. 1229.

Louisville & Nashville R. R. Co. v. *Kentucky*, 161 U. S. 677, 40 L. Ed. 849.

IX.

The order of the Commission is void if it authorizes the consolidation of the Properties of the River Road and the Junction Road into a single corporation in violation of Paragraph (6) of Section 5, because the Commission had not (has not yet) perfected its general plan of consolidation.

Interstate Commerce Act, par. 6 of Sec. 5, 41 Stat. L. 480.

X.

The order is void insofar as it permits the River Road to lease the properties of the Junction, because neither the River Road nor the Junction Road made any application to the Commission for the authorization contained in the order.

Interstate Commerce Act, par. 2 of Sec. 5, 41 Stat. L. 480.

Hanlon v. Eshelman, 169 Calif. 200, 146 Pac. 656, P. U. R. 1915-B, 842.

XI.

The order of the Commission is not a specific finding that the acquisition by the Central of the River Road and Junction Road will be in the public interest.

XII.

The order of the Commission is void because it does not specify the date upon which the same shall become effective.

Interstate Commerce Act, par. 2 of Sec. 15, 34 Stat. L. 584.

XIII.

The order is void insofar as it approves and authorizes the leasing of the Junction properties, owned and leased, to the River Road, because no lease executed by the parties has been submitted to and been approved by the Commission.

Control of Central Pacific by Southern Pacific, 76 I. C. C. 508.

ARGUMENT.

1. Plaintiffs May Properly Bring This Suit.

In this part of the brief we shall discuss the provisions of the statute and court decisions bearing upon the right of these plaintiffs to bring this particular suit. No attack is made upon the venue laid in this case. It is, however, asserted strenuously that these particular plaintiffs cannot maintain this particular suit under the circumstances shown of record. The authority of the Commission was exercised so as to approve and authorize acquisition of control by the Central of the River Road and the River Road of the Junction by lease. If these plaintiffs cannot invoke a judicial determination of the legality of the Commission's order, who can? The New York Central Lines could not be expected to question the validity of a decision in their favor. The Department of Justice could not be expected to bring a suit to establish the validity of the Commission's order. Unless these plaintiffs may invoke the jurisdiction of the courts, then the action of the Commission is beyond any review in the courts.

(a) *The venue is properly laid.*

District Court Jurisdiction Act, approved October 22, 1913, 38 Stat. L. 219, abolished the Commerce Court, vested its jurisdiction in the District Court of the United States, and further provided:

> "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose peti-

tion the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party, the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office."

The order complained of was made upon the petition of the New York Central Railroad Company, defendant, and that corporation is a resident of the Northern District of Illinois. If the order complained of does not relate to transportation, or is not made upon the petition of any party, the matter complained of, viz.: control of the Junction and River Road, is in the Northern District of Illinois. If the order does not relate either to transportation or to a matter complained of before the Commission, then the matter covered by the order arises in the Northern District of Illinois, where the Chicago, Indianapolis & Louisville Railway Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, petitioners in court, have their principal operating offices.

Section 1 of the Commerce Court Act (36 Stat. L. 539) created the Commerce Court and gave it the jurisdiction vested by Circuit Courts over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

Section 4 of the Commerce Court Act provided that all cases in the Commerce Court which would but for that Act have been brought against the Interstate Commerce Commission, should be brought against the United States.

The District Court Act provided that

> "The procedure in the District Courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court."

(b) *Plaintiffs are proper parties, and have such an interest in the order of the Commission as to entitle them to maintain this suit.*

Section 5 of the Commerce Court Act provided that the attorney general should have charge and control of the interests of the government in all cases in the Commerce Court and in the Supreme Court upon appeal from the Commerce Court. This section contained a proviso:

> "That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the terms of this Act, or the acts of which it is amendatory or which are amenda-

tory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General of the United States therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

All of the plaintiffs in this case were parties to the proceeding before the Commission out of which the order and decision of the Commission arose, and under the Commerce Court Act they may appear as parties to the proceeding in the Commerce Court and, we may add, now in the District Court.

Moreover, in Section 2 of the Elkins Act, 32 Stat. L. 847, it is provided:

"That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

Plaintiffs as parties interested in or affected by the order made by the Commission, have a right to bring

this suit. Paragraph 20 of Section 1 of the act provides that any operation contrary to the provisions of Paragraph 18 or 19 of Section 1 may be enjoined by any court of competent jurisdiction at the suit of the United States, the Interstate Commerce Commission or any commission or regulating body of the state or states affected, or any party in interest.

In *Detroit & M. R. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540, the District Court for the Eastern District of Michigan considered the right of the Detroit & Mackinaw Railway Company to an injunction restraining the Boyne City, Gaylord & Alpena R. R. Co. from constructing or operating certain tracks of railroad without first obtaining from the Interstate Commerce Commission a certificate of public necessity and convenience. It was contended that the plaintiff was not "a party in interest" within the meaning of paragraph 20 of Section 1 of the Interstate Commerce Act, which provides "any construction, operation, or abandonment contrary to the provisions of this paragraph, or of paragraph 18 or 19 of this section, may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the state or states affected, or any party in interest." The court held that the railroad company now operating, and whose business would be affected by the construction of a competing line, was a party in interest and as such entitled to the relief prayed for, and enjoined the construction of the proposed extension unless and until there should first have been obtained from the Interstate Commerce Commission a certificate of public convenience and necessity.

In various cases similar to this the courts have uniformly sustained the right of parties similarly situated to invoke jurisdiction of the court to test the validity of these orders.

In the case of *F. H. Peavey & Co. et al.* v. *Union Pacific Co.*, 176 Fed. 409, 417, the court said:

> "A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the Commission to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. 'The jurisdiction to hear and determine suits' is vested in the Circuit Courts. Section 16, as amended (34 Stat. 592 (U. S. Comp. St. Supp. 1909, p. 1162)). The determination of the question what parties may mainatin such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a federal court of equity for relief."

And further at pages 417-418:

> "The complainants in the Diffenbaugh case are entitled to challenge the order of the commission in this court. The allegations in their bill that this order was beyond the power of the commission and will irreparably injure their property and their business present good ground for equitable relief, and the demurrer of the commission must be overruled. For the same reasons, the petitions of the railroad companies that seek to intervene present substantial equities and their motion for leave to file them and to become parties to this suit must be granted."

Upon appeal to this court the decision of the lower court was affirmed, Justice Holmes saying, 222 U. S. 42, 49, 56 L. Ed. 83-88:

> "The jurisdiction in the Diffenbaugh case was doubted, although the Commission did not press the point, as it wishes a final decision. We are content to leave that matter on the statement of the court below. 176 Fed. 416, 417. The plaintiffs are affected by the order, and it is just that they should have a chance to be heard, although not parties before the Commission."

In this case it cannot be doubted that plaintiffs are affected by the order. That they were affected was made plain in the petition of intervention filed by the Commission and is recognized by the Commission in its report and opinion wherein it is stated (Rec., 19):

> "The intervening carriers contend, in effect, and offer proofs tending to show, that the plan is contrary to public interest because the Junction and River Road lines are now neutral and open to all carriers and shippers on equal terms; that the plan would substitute monopoly of these facilities for the present neutrality of operation, to preserve which the Transportation Act, 1920, was designed, as evidenced by paragraph (4), Section 3 of the Interstate Commerce Act, as amended; that the livestock market requires open operation of the facilities serving the stock yards, and the shippers in the district must have competitive service by neutral terminals; that the car supply for the district cannot and will not be handled fairly by the Junction if controlled by the Central; that the latter will be able by means of such control to divert a large volume of competitive line-haul traffic to its own rails, thereby causing the intervening carriers to lose earnings to such an extent as to necessitate advanced rates, and that such carriers have an equity in the properties by reason of having contributed to the Junction's earnings. They offer to combine with the Central in a joint control of the properties on the basis of their fair value."

On this state of the record it ought not be difficult to reach the conclusion that these plaintiffs are parties who have such an interest in the order of the Commission as to entitle them to maintain this suit.

In *Edward Hines, Yellow Pine Trustees, et al.* v. *United States et al.*, No. 91, decided November 12, 1923, this court held that the mere fact that plaintiffs were not parties to the proceedings in which the order of the Commission was entered, does not constitute a bar to a suit, but plaintiffs could not maintain the suit merely by show-

ing that the Commission was without power to make the order complained of. As the court said, plaintiffs "must show also that the order alleged to be void subjects them to legal injury, actual or threatened." So in this case, inasmuch as plaintiffs were parties to the proceedings in which the order was entered, they may maintain the suit, but they must also show that the order complained of subjects them to legal injury, actual or threatened.

That plaintiffs are subjected by the order complained of to legal injury appears from the allegations in amended paragraph XII of the bill of complaint which reads as follows (Rec., 53):

> "Plaintiffs further show that the River Road and the Junction, on May 15, 1922, were, and prior to that date always had been, neutral belt railroads uncontrolled by any trunk line carrier and as such were used by all railroads entering Chicago, impartially and without discrimination; that prior to May 16, 1922, the plaintiffs herein competed for traffic originating at points of origin on, or destined to points of delivery on, the said River Road and the Junction on equal terms with the Central without either the plaintiffs or the Central having any advantage in the securing of said traffic by reason of having an ownership or control of the said River Road and/or the said Junction; that the acquisition of control approved and authorized by the Commission in its order of May 16, 1922, substitutes monopoly of control and operation for the neutral control and operation of the Junction and River Roads which prior to May 16, 1922, served alike all railroads reaching Chicago, including the plaintiffs herein and the Central; that practically all of the tonnage originating at or destined to points on the Junction and the River Roads is competitive tonnage in that the same could be hauled either over the lines of railroad constituent parts of the New York Central System or over the lines of one or more of your plaintiffs; that the control of a belt line by one line-haul carrier gives that line-haul carrier substantial advantages in the securing of competitive tonnage to the consequent disad-

vantage of competing line-haul carriers not having such control; that in cases where the shippers on the River Road and the Junction have failed to direct the route of movement of their shipments consigned to points which are served by the Central or by lines of railroad constituent parts of the New York Central System, directly or through its or their connections, as well as by the plaintiffs herein, directly or by their connections, it is and since May 16, 1922, has been the practice of the officials, agents and employees of the River Road and the Junction to route said shipments via the line of the Central and via the lines of carriers constituent parts of the New York Central System to the exclusion of routing any of said shipments via the lines of the plaintiffs herein; that the acquisition of control approved and authorized by the Commission in its said order has curtailed, and so long as it continues to exist, will, greatly curtail the ability of the plaintiffs to secure the competitive traffic of shippers located upon the lines of the Junction and the River Road for the reason that subsequent to May 16, 1922, it has been, now is, and will be, the practice of shippers located on the said railroads to give preference to cars of the Central (which, under the order complained of, has the control of the said Roads) to the exclusion of cars of the plaintiffs, its competitors, and to route their shipments via the line of the Central and via the lines of railroad constituent parts of the New York Central System in lieu of routing said shipments via the lines of the plaintiffs herein; that the diversion of tonnage from the rails of the plaintiffs to the rails of the Central or other routes of the New York Central System, consequent upon the facts above related has resulted in a large loss of traffic and of revenue to the plaintiffs, to their irreparable loss and injury, in an amount exceeding $10,000,000; and that the loss in net earnings to plaintiffs which will result from the continued control acquired under the said order of the Commission will approximate $10,000,000 per annum so long as said control continues."

The foregoing allegations, which are admitted upon motion to dismiss, show that *by reason of the control*

which the New York Central acquired under the order of the Commission, tonnage which prior to the order moved via the lines of the plaintiffs, and but for the order would continue to move via the lines of the plaintiffs, now moves via the lines of the New York Central System, with resulting loss of revenue to these plaintiffs.

In the report of the Commission it is recited that the Junction and River Road handle traffic of the stock yards and Central Manufacturing District in the City of Chicago. While the report does not set forth the volume of traffic handled to and from the stock yards and packing house industries, it is a matter of general public information that the volume of this traffic is tremendous. The Commission does refer to the Central Manufacturing District as an institution which has been in existence for about fifteen years, having 180 industries, producing a tonnage of over 100,000 carloads per year and 100,000 tons per year of less-carload freight. (Rec., 17.)

On this state of facts it is obvious that claims of the plaintiffs are most substantial. But for the order complained of the New York Central Lines would have no control whatever over the routing of shipments, furnishing of cars, and the many other activities of the terminal carrier, which vitally affect the selection of the line-haul carriers for the handling of freight consigned to and from industries located on the Junction and River Roads.

This is not a case where plaintiffs are subjected to loss "incident to more effective competition." This is a case where open unrestricted competition has been converted into a complete monopoly. The ideal terminal situation, both as regards ownership and operation, existed prior to the action of the Commission in permitting the New York Central System to acquire the Junction and River Roads. What was feared and was urged upon the Com-

mission as a reason for denying the application for control, has actually resulted. Not mere fear of possible damage do plaintiffs show; actual loss to the plaintiffs has resulted from the unlawful order of the Commission.

The Commission recognized that these plaintiffs would lose business to the New York Central if the acquisition was authorized, saying in its opinion (Rec., 22):

> "There is, of course, every indication that the Central will be able to build up its own line-haul traffic as the result of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end."

The contention we are here making is supported by many decisions, a few of which are here set forth:

In a suit to set aside an order of the Interstate Commerce Commission, *The Atlantic Coast Line R. Co. et al. v. Interstate Commerce Commission*, 194 Fed. 449, by demurrer and motion to dismiss, the question of the right of two railroad companies and two steamship companies not named in the order of the Commission but joined as parties with others in the bill, was raised. The bill alleged that the parties plaintiff in the bill who were not parties to the proceeding before the Commission, and against whom no order was issued, would have to make a voluntary reduction in their rates to the rates named in the order running against competing carriers. The Commerce Court held that these parties had sufficient interest in the subject matter of the suit to become parties plaintiff to set aside the order of the Commission. This case went no farther.

In *McLean Lumber Company* v. *United States*, 237 Fed. 460, the plaintiffs brought a bill in equity to enjoin an order of the Commission which canceled certain rates under suspension and permitted modified rates to

go into effect. The Interstate Commerce Commission moved to dismiss the petition on the ground that the order under attack did not directly affect the petitioners' own property or its use, and because petitioners had no vested interest in any rates filed by a carrier with the Commission. The court, Warrington, Circuit Judge, and Sanford and McCall, District Judges, held, however (page 464):

> "The petitioners have such interest in the rates ordered by the Commission to be put into effect as to entitle them to maintain this proceeding. They are manufacturers of lumber, having mills at Chattanooga, constructed and equipped at large expense, to whose operation, as they allege, logs purchased along the line of the railroad company in Alabama and Mississippi is the chief and indispensable source of supply; and, as they allege, the increased rates on these logs fixed by the orders of the Commission have caused the plant of one of the petitioners to be wholly abandoned, that of another to be shut down, and those of the two others to be greatly limited in their operations. Under the allegations of the petition they are directly affected in the conduct of their business by the orders of the Commission; and, if the rates fixed by these orders are unreasonably high, have suffered and will suffer great pecuniary damage.
>
> We cannot sustain the contention made by the Commission, in which the United States does not join, that merely because the orders made by the Commission do not directly affect the petitioners' own property or its use, and because they have no vested interest in any rates filed by a carrier with the Commission, they have no such pecuniary interest or property right involved under the orders in question as to give them a standing in court for the purpose of obtaining injunctive relief."

The court reviews *Merchants Association* v. *U. S.*, 231 Fed. 292, and *Railroad Company* v. *Ellerman*, 105 U. S. 166, and *In re Debs*, 158 U. S. 564, and further says (page 465):

"we find nothing in these decisions constraining us to conclude that the interest of a shipper in the rate which he is required to pay for the transportation of his property in the necessary conduct of his business is not such a direct pecuniary interest and property right as to give him the necessary standing in a court of equity for its protection."

The court then reviews other cases, comments upon the Commerce Court Act and the District Court Act, and continues (page 467):

"Construing the foregoing provisions of the Commerce Court Act in their entirety, we are of opinion that it was intended that any person who had acquired a standing as a party in interest in proceedings before the Commission should have the right to appear as a party in any suit brought in the court involving the validity of an order therein made by the Commission, as distinguished from the mere right of intervention given to other persons who were not parties in interest before the Commission, but merely 'interested in the controversy or question,' and that the right thus given to a party in interest before the Commission is not limited to his appearance as an intervener in such proceedings as may be instituted by other parties in interest before the Commission, but includes the right to appear in the court as a party plaintiff in proceedings which he himself may bring to test the validity of the order of the Commission. And we hence conclude that, under the statutory provisions above quoted, the petitioners herein, having duly appeared before the Commissioners as complainants against the rates proposed to be established under the new schedule filed by the railroad company, not only became parties in interest before the Commission in the proceedings had upon such complaint, but that as such parties in interest in such proceedings they are now entitled, as of right, to appear as parties plaintiff under their petition in this court in proceedings to set aside the order of the Commission."

In *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; 65 L. Ed. 349, this court held that the Clayton Act

gives to private parties a right to relief by injunction in any court of the United States against threatened loss or damage from a violation of the anti-trust laws "under the conditions and principles regulating the granting of such relief by courts of equity." This court there pointed out the nature of the threatened loss to the plant, as follows (page 465):

> "That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a wide-spread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that, as a result of it, complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future,—is proved by clear and undisputed evidence. Hence, the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act, as amended by the Clayton Act."

Paraphrasing what was said there, we think the right of plaintiff's railroads to secure and transport traffic from shippers located on the Chicago Junction Railway, in commerce, is a property right entitled to protection against unlawful injury or interference.

As a result of the unlawful order complained of in this case, the New York Central Lines are put in position to seize what theretofore had been business of these plaintiffs, and to divert the same to routes of the New York Central Lines, where the line haul revenue would be received and retained by the New York Central Lines. Not solely because they are in better position to compete with these plaintiffs do the New York Central

Lines receive this diverted traffic, but because they are in a position to seize the property and direct its routing. It is not alone by reason of increased competition that these plaintiffs are injured, but in addition because of the actual control and possession of the Junction Railways with consequent power to route traffic, that these plaintiffs are injured.

In *American Steel Foundries* v. *Tri-City Central Trades Council, et al.*, 257 U. S. 184; 66 L. Ed. 189, this court held that the irreparable injury to a property right, which under Section 20 of the Clayton Act of October 15, 1914, affords ground for injunctive relief in cases "between an employer and employees, or between employers and employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment" includes injury to the business of the employer, following *Duplex Printing Press Co.* v. *Deering, supra.*

In *International Railway Co.* v. *Davidson*, 257 U. S. 506, 66 L. ed. 341, this court sustained the right of the International Railway Company to maintain a suit against the Collector at the port of Buffalo, holding that the owner of the International toll bridge, by its passenger trolley cars and by foot and vehicular traffic, had a sufficient interest to justify a resort to relief by injunction against the threatened enforcement of a ruling of the Treasury Department under which the continuance of customs inspection service on Sundays and holidays at the American end of the bridge is conditioned upon the payment by the bridge owner of the extra cost of the inspection service on those days and the giving of an indemnity bond to the United States covering any resultant losses to the government. There the plaintiff insisted that the power asserted by the Collector would

result in depriving the plaintiff of business which it would receive but for the unlawful act of the Collector. This court found that "the instructions given threaten vital interests of the Bridge Company, to which a court of equity should afford protection."

In *Raritan & Delaware Bay Railroad Co. et al.* v. *Delaware & Raritan Canal, et al.*, 18 N. J. Eq. 546, an injunction was issued to prohibit a rival railroad from engaging in the transportation of passengers or merchandise between the cities of New York and Philidelphia without the consent of the plaintiff, in accordance with the provisions of an act of the legislature of the State of Delaware. It was contended that the plaintiff had no right to bring such a suit, the question being, as stated by the court "has a railroad company any redress against a competition, unwarranted by law, and which materially affects the value of the privilege with which it is legally vested?" We quote from that decision (570-1):

> "I am at a loss to perceive upon what premises, or by what course of reasoning, other than an affirmative answer to this question could be justified. A franchise to build a railroad for public use and to take tolls, is property, the title to which is held from the sovereign; and, like every other thing susceptible of private ownership, it must, of necessity, be under the protection of the laws. Unless it can be shown that this species of right is altogether anomalous in its character, and is under the control of exceptional rules, a wrongful invasion of such right cannot but be followed by a legal vindication. Theoretically, then, the claim to judicial redress is clear, and all legal analogies, as well as decided cases, concur in support of the same view."

In *Memphis Street Railway Co.* v. *Rapid Transit Co.* (Tenn.), 179 S. W. 635; P. U. R., 1916-A, 834, the Supreme Court of the State of Tennessee discussed in a very comprehensive way, and cited numerous authorities in support of, the proposition that a common car-

rier, although it owns a non-exclusive franchise, has a property right entitling it to enjoin the competitive operations of other carriers, when such operations are without necessary legislative or municipal authority. There the court said:

> "The complainant does not seek an injunction here on the theory that it is possessed of an exclusive franchise to conduct the business of common carrier of passengers on the streets of Memphis. The contention of complainant is that, having been granted a franchise as such common carrier, it has a property right that will entitle it to restrain any person or corporation from attempting to engage in the business of common carrier of passengers on the streets of Memphis, in competition with complainant, without legislative or municipal authority. Complainant concedes that its franchise is not exclusive, in the sense that a similar franchise might not be granted to another to be exercised and enjoyed in the City of Memphis; but it maintains that its franchise is exclusive against all persons upon whom similar rights have not been conferred by legislative sanction.
>
> We think this contention is well founded and supported by the great body of authority."

In *Brooklyn City R. R. Co.* v. *Whalen*, 191 App. Div. 737; 182 N. Y. Supp. 283, the court, on the application of a competing street railway company, enjoined the operation of a bus line operating without a franchise, saying, page 287 of 182 N. Y.:

> "The plaintiff plainly suffers a special injury from the competition of these stage lines and from the added obstruction to the operation of its cars under its franchise. Even if the order establishing the lease is not to injure the plaintiff in the exercise of its legal rights, it has that effect. * * * A common carrier, therefore, has a legal right to question the necessity and convenience to the people of a paralleling common carrier. * * * The plaintiff having a franchise to operate in the public streets and being under financial pressure of the prevailing

economic conditions, suddenly finds its most profitable lines paralleled by stages operating under the control of the defendant without the authority of law and without having obtained a certificate of public convenience and necessity. I think the plaintiff has a standing in a court of equity for relief."

In *People of the State of New York ex rel. The New York Central & Hudson River Railroad Co.* v. *Public Service Commission*, 195 N. Y. 157, the court had under consideration a determination of the Board of Railroad Commissioners in granting a Certificate of Public Convenience and Necessity under Section 59 of the Railroad Law to the Buffalo, Niagara Falls & Rochester Railway Co. The court said in part (p. 166):

"It is also insisted by the appellant that the relator was not a party aggrieved by the action of the board of railroad commissioners. That was a question for the board and the Appellate Division to consider. It turned upon the facts relating to the relator's situation, as affected by the proposed railroad construction. The relator showed that it would be affected, inasmuch as it owned other roads more or less paralleling the proposed road and serving the same territory. It appeared at the hearings and was allowed to take part in the proceedings by the tribunal, as having an interest in the controversy. The certificate of public convenience and necessity is to be granted upon considerations, not alone, bearing upon the convenience of the public, but affecting the other transportation companies, which are already serving the territory. They have the right to be considered and to be protected, where there is no necessity for a wider public service, against the designs of persons more interested in forcing terms from them, than in subserving the public convenience. Certainly the rights of shareholders in the existing roads demand fair consideration."

This decision was followed in a later case, *People ex rel. New York Edison Co.* v. *Willcox*, 207 N. Y., page 86, where the court said in part (page 95):

"The appellant was and for many years had been furnishing electricity for light, heat and power in the boroughs of Manhattan and The Bronx. It was directly and seriously interested in this proceeding which thus involved the consideration and determination of the present right of the respondent to place wires for those uses in those boroughs or acquire property or construct a plant to be used in competition with it. The commission might legally and justly permit it to become a party to the proceeding and the determination adverse to it after its intervention was reviewable, under certiorari, upon its application as the party aggrieved thereby."

In *Conway* v. *Taylor,* 66 U. S. 603, 17 L. Ed. 191, the court enjoined invasions of the complainant's ferry rights on the ground that the ferry franchise was a property right and that any interference therewith was enjoinable.

In *Town of East Hartford* v. *Hartford Bridge Co.,* 10 How. 511; 13 L. Ed. 518, this court sustained an injunction against the operation of a ferry at the suit of a bridge company. The Town of East Hartford operated a ferry on the Connecticut River under a franchise conferred by the legislature. Upon the erection of a bridge by the Bridge Company the legislature resolved that the ferry should be discontinued. Thereafter, however, the town re-established the ferry and the Bridge Company thereupon sought to enjoin its operation. After reviewing the facts, this court, speaking through Mr. Justice Woodbury said, (page 530):

"It follows, then, finally, that East Hartford, in proceeding to exercise the ferry privilege again since 1842, and to the special injury of the Bridge Company, has done it without legal authority, and should therefore be restrained by an injunction from exercising it longer."

In the *Slaughter House Cases,* 16 Wall. 36; 21 L. Ed. 394, this court sustained the right of the Slaughter

House Company to enjoin operation by its competitors under a statute conferring an exclusive privilege in the Slaughter House Company to carry on a live stock landing and slaughter house business at New Orleans.

In the case of *Bartlesville Electric Light & Power Co.* v. *Bartlesville Interurban Railway Company*, 29 L. R. A. 77, the Supreme Court of Oklahoma held that the Bartlesville Electric Light & Power Company had a right to sue to restrain the Bartlesville Interurban Railway Company from using streets, lanes and alleys of the City of Bartlesville for the purpose of erecting thereon a system of poles and wires for the purpose of supplying the city and its inhabitants with electric light and power, because their erection without legislative authority from the municipal corporation was such an infringement of plaintiff's rights to exercise a franchise theretofore granted, as constituted an infringement of property rights.

To that decision is appended a note which collects the authorities supporting the right of the owner of a franchise for public benefit, not exclusive, to injunction against the invasion of such franchises without right by another party.

We are not unmindful of the fact that there is a class of cases, such as *Baxter Telephone Co.* v. *Cherokee County Mutual Telephone Ass'n.*, 94 Kans. 159, 146 Pac. 324, in which the Supreme Court of Kansas held that a telephone company has not that peculiar interest in the establishment of a second telephone company in a competitive field as distinguished from the general public, so as to authorize it to maintain an injunction suit against its rival, when that rival does not hold a license from the Public Utilities Commission under Laws 1911, Chap. 238, Sec. 31. The weight of authority, however, and the better reasoning, is against the rule enunciated in the *Baxter Telephone case*.

The question of the right of these plaintiffs to bring this suit under the circumstances of record presents for decision a matter of public importance. It is hardly probable that Congress intended that no court review could be had of any order of the Commision under paragraph (2) of Section 5 of the Interstate Commerce Act. It is abhorrent to the principles of the Interstate Commerce Act that arbitrary power may be exercised by the Commission without any power in the courts to restrain. The beneficiary of an order from the Commission under this section could hardly be expected to ask court review; who else but an injured party such as a competitor would be likely to complain? Where there is an injury there must be a remedy; where there is a right there must be a means to enforce that right.

In passing upon this question the court should effectuate the great purposes of the Interstate Commerce Act; equality of treatment between shippers and between carriers, removal of unjust discriminations and prevention of undue preferences or prejudices were intended by the Congress. No obstacles to any party appealing to the judicial power for relief from an unlawful order of the Commision should be recognized by this court, unless the statute clearly requires it.

One of the prime purposes of amendments to the Interstate Commerce Act made by the Transportation Act, 1920, was to provide for national systems of transportation by protecting and supporting the weaker lines of railroad necessary to the public as a whole. Section 5 deals with the consolidation of railroads, merging the weaker with the stronger and thus providing a vigorous system in its entirety. The effect of the order under consideration is to make an already strong line stronger still,—an already rich line richer still,—by weakening competing lines, some of which at least are not as strong

or as rich as the New York Central System. If the Commission unlawfully, forgetful of the purposes of Congress, does put a strong line in position to weaken a competitor by taking tonnage necessary for the support of the weaker line, diverting revenue therefrom to its own treasury, is it possible that the lines thus injured, cannot appeal to the courts for relief from the injury thus inflicted?

As confirming what we have here said, we call attention to the Commission's opinion promulgating the tentative plan of consolidation, *Consolidation of Railroads*, 63 I. C. C. 455, 481:

> "This tentative plan for consolidation proceeds upon the assumption that the distinction between so-called weak and strong roads, financially, is at present highly uncertain; and that it will require a period of experience under the new rates and under the new division of through rates as well as under the slowly readjusted commercial and industrial conditions after the war, in order to establish the relative earning power and credit of each. A period of trial is often necessary, both to reveal elements of strength and of weakness. Substantial equilibrium seems unlikely to be attained for a considerable period of time. Yet in the meanwhile, tentative plans must be set up, in preparation for the application of the final test of relative financial strength as soon as the available data make this possible."

2. Plaintiffs Are Properly Joined As Parties.

All of the plaintiffs were parties to the case before the Commission and as such are proper plaintiffs herein. Each of the plaintiffs is a competitor of the New York Central and complains of the effect upon its line-haul revenue which, it is asserted, follows the ownership of the Junction Roads and the control thereof by the Central.

Each of the plaintiffs has the same cause of action; each asserts the invalidity of the order of the Commission upon which the Central bases its authority for the control it exercises; each plaintiff asserts the same source of injury and each asks the same relief.

The equity rules clearly provide for the joinder of parties plaintiff. Rule 37 provides:

> "All parties having an interest in the subject of the action and in obtaining the relief demanded, may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff."

In *Philadelphia & Reading Railway Company* v. *Laurel Coal Mining Company*, 276 Fed. 1019, page 1020, the court stated the rule as follows:

> "Upon a demurrer for misjoinder of plaintiffs, the question to be determined is whether either or both plaintiffs have a remedial interest in the cause of action asserted."

In *Goldfield Consolidated Mining Co.* v. *Richards*, 194 Fed. 198, several owners of mines in severalty were permitted to join as parties plaintiff in a bill seeking to restrain several defendants (not acting in concert) from further purchase of stolen ore. At page 204 the court said:

> "The convenience of court and litigants demands that this controversy shall be determined in one suit, if one decree can be made which can do entire justice to all parties without jeopardizing any substantial rights."

In the case of *Risley et al.* v. *City of Utica et al.*, 173 Fed. 502, the plaintiffs were all property owners at Utica, New York, and filed a bill to enjoin the cancellation of an illegal tax. On demurrer, alleging misjoinder of parties, the court said (page 506):

> "The situation and rights of the complainants are sufficiently similar; their interests may not be joint, but they are common."

That Congress intended in cases of this sort that all parties interested in or affected by the order complained of might join in a single suit, is clearly indicated by Section 2 of the Elkins Act, *supra*, wherein it is provided that in any proceeding for the enforcement of the provisions of statutes relating to interstate commerce it should be lawful to include as parties in addition to the carrier, all parties interested in or affected by the rate, regulation or practice under consideration.

3. The Order Complained of is Affirmative and is Properly Within the Jurisdiction of this Court.

The motion of the United States to dismiss contends that the order is negative insofar as it relates to the plaintiffs and a mere permissive order insofar as it relates to the defendants, other than the United States, against which order a suit to enjoin will not lie under the Commerce Court Act and the Urgent Deficiencies Act of October 22, 1913.

At this point it is important to note the exact form of the order of the Commission in this case. The order provides (Rec., 33, 34):

> "*It is ordered*, That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.
>
> *It is further ordered*, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized."

It is clear that the Commission exerted authority in an affirmative manner, that is to say, it approved the acquisition of control by the New York Central of the Chicago River & Indiana by purchase of capital stock and acquisition of control by the Chicago River & Indiana of the property of the Chicago Junction, by lease. The New York Central had made an application to the Commission for a certificate of convenience and necessity and for authority; the former the Commission denied; the latter the Commission granted. If the Commission had dismissed the application, it would have entered a negative order. We think it apparent from the decision of this court in the *Procter & Gamble case,* 225 U. S. 282, 56 L. Ed. 1091, urged by the United States in support of its motion to dismiss in this case, that there is no analogy or identity of situation in this case and in the *Proctor & Gamble* case.

Moreover, the motion to dismiss entirely overlooks the reasoning of this court in the *Proctor & Gamble case.* In that case the Interstate Commerce Commission had issued an order dismissing a complaint of the Proctor & Gamble Company directed at a carriers' tariff assessing demurrage on private cars. Procter & Gamble, complainant before the Commission, filed a petition in the Commerce Court praying that the order of the Commission dismissing its complaint be set aside and annulled and that the defendant carriers be enjoined from collecting demurrage charges upon its private tank cars. The carriers challenged the jurisdiction of the court on the ground that the order of the Commission was negative. This contention was overruled by the Commerce Court and the bill was dismissed upon its merits. (183 Fed. 221.) Upon appeal to this court, it was held that the order was not properly within the jurisdiction of the courts, as the statute conferred

jurisdiction only to entertain complaints "as to affirmative orders of the Commission."

Mr. Chief Justice White in delivering the opinion of the court, pointed out that the only question to be decided in that case was whether, when a complainant had been denied relief by the Commission, he had a right to invoke the jurisdiction of the courts upon the merits of such dismissal.

In considering the decision in the *Procter & Gamble case* it must be borne constantly in mind, as stated by the learned Chief Justice, that the error committed by the court below was "in holding that it had jurisdiction over the claim of the Procter & Gamble Company to recover on a money demand, based on the illegality of the demurrage charges alleged to have been wrongfully exacted by the railroad companies."

Whatever may have been the language of the opinion in that case, it must constantly be borne in mind that the court was dealing solely with an order of the Commission dismissing a formal complaint, the effect of which had been simply a denial of relief sought by the complainant,—a plain case of "negative order."

In the *Intermountain Rate Case*, 234 U. S. 476, 58 Law Ed. 1408, this court refused to hold that the District Court had no jurisdiction of an order made by the Commission almost identical in form and effect with that in the present case. By the Fourth Section of the Interstate Commerce Act, 36 Stat. L. 547, it is made unlawful for any common carrier to charge more for a shorter than for a longer distance, over the same line or route, in the same direction, the shorter being included within the longer distance, provided, however, "that upon application to the Interstate Commerce Commission such common carrier may in special cases

after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property." After a hearing the Commision had entered Fourth Section Order 124, denying certain applications for fourth section relief, and further providing:

> "that petitioners herein be, and they are hereby, authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3 and 4, as above defined, to points intermediate to Pacific Coast Terminals that are higher to intermediate points than to Pacific Coast terminals; * * * The Commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation and correction if they conflict with any other provisions of the act."

The Commission contended that the court had no jurisdiction in the proceeding, because the order of the Commission was negative in character. The court refused to hold that it had not jurisdiction, saying (page 490-1):

> "The second contention as to jurisdiction yet further affords an illustration of the same mental attitude, since it rests upon the assumption that the order of the Commission refusing to grant the request of the carrier made under the 4th section was purely negative, and hence was not subject to judicial inquiry. The contention therefore presupposes that the power which, from the beginning, has been the subject of judicial review, by the mere fact of its transfer to the Commission was made arbitrary. Besides, the proposition disregards the fact that the right to petition the Commission conferred by the statute is positive, and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative, since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist. It is, of course, true, as pointed out in *Interstate Commerce Commision* v.

Illinois C. R. Co., 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155, and since repeatedly applied; that findings of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended, or have been exercised in such an arbitrary way as to amount to the exertion of authority not given,—doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse, but, on the contrary, carries with it as a necessary incident the command that the limits of a sound discretion be not transcended; which, by necessary implication, carries with it the existence of judicial power to correct wrongs done by such excess."

In the present case the Commission is given jurisdiction upon application to make an order permitting one carrier to acquire control of another under certain circumstances, just as in the fourth section provision the Commission is authorized under certain circumstances to permit a carrier to charge more for the shorter than for the longer haul, the shorter distance being included within the longer distance. We see no basis upon which a contention that the order in the present case is negative can be sustained, any more than it could be sustained in the fourth section order.

In the *Tap Line Cases*, 209 Fed. 244, 251, the Commerce Court said:

> "It is urged upon us that the petitions herein should be dismissed on the ground either that, though affirmative in form, they are nevertheless negative in substance, or that the petitioners in this court are not those against whom the order is directed. This motion must be denied. The amended order is clearly an affirmative order. It expressly forbids certain action because of its illegality."

Upon appeal to this court; 234 U. S. 1, 58 L. Ed. 1185, the decision of the Commerce Court was affirmed. On the question of jurisdiction of the Commerce Court, this court reached the same conclusion as did the Commerce Court, that the order was affirmative in its nature and of a character permitting of review under the Commerce Court Act.

In the following two cases the courts have taken jurisdiction of suits brought to enjoin orders of the Commission, and these decisions are authorities in support of the proposition we are here making:

Skinner & Eddy Corp. v. *U. S.*, 249 U. S. 557, 63 L. Ed. 772. There the Commission authorized an increase in west-bound transcontinental freight rates. (*Re Reopened Fourth Section Applications*, 40 I. C. C. 35.) The shippers brought the bill to enjoin and the Supreme Court held that the District Court had jurisdiction of the subject-matter of the suit.

McLean Lumber Co. v. *U. S.*, 237 Fed. 460. There the order sought to be enjoined was one entered in an Investigation & Suspension proceeding permitting the carrier to increase its log rates. Such an order is, of course, permissive but the District Court entertained jurisdiction of the suit.

From these decisions it is clear that the District Courts of the United States now have jurisdiction to set aside an illegal order. The mere form of the order is not controlling. Under paragraph 2 of Section 5 of the Interstate Commerce Act, no carrier can acquire control of another carrier without a finding by the Commission that the acquisition will be in the public interest. The finding of the Commission must be in accordance with the statute. Unless these plaintiffs have the right to invoke review by the

courts of the order under consideration, then no matte how arbitrary or unlawful any order of the Commissio issued under this paragraph may be, there would be n means by which to determine the legality of the Com mission's order. The act of the Commission, neither i letter or in spirit, falls within the Procter & Gam ble decision. The action of the Commission wa affirmative in character; it permitted and authorize the acquisition of the River Road and the Junctio Road, and is such an order as is covered by the second subdivision of Section 1 of the Commerce Court Act and therefore this court has jurisdiction.

The action taken under the order is no different from that which would have been taken had the Commission "ordered and directed" the Central to acquire control etc. The net result of the order is that the River Road and the Junction Road are now New York Central properties, owned, managed and operated as part of the New York Central System. Measured by its results, the order is affirmative in character and subject to the jurisdiction of the court.

4. The Bill is Not Multifarious.

It is objected that the bill is multifarious in that it seeks to enjoin an order of the Commission and at the same time to require the corporate defendants and Richard Fitzgerald to vacate, annul and rescind all action taken by said defendants in alleged conformity with the order of the Commission.

It is well recognized that in equity pleadings there must be no multifariousness; the difficulty is to determine when that rule is violated. Mr. Justice Daniel, in *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368, cites with approval the rule laid down by Mr. Justice Story (page 260):

"Justice Story, in his compilation upon equity pleading, defines multifariousness in a bill to mean 'the improperly joining in one bill distinct and independent matters, and thereby confounding them.' * * * Justice Story closes his review of the authorities upon this defect in a bill with the following remark: 'The conclusion to which a close survey of all the authorities will conduct us, seems to be, that there is not any positive, inflexible rule, as to what, in the sense of a court of equity, constitutes multifariousness, which is fatal to a suit on demurrer.'"

Applying the foregoing definition of Justice Story, there is no improper joining in this bill of distinct and independent matters. Only by reason of the Commission's order, and solely upon the authority therein conveyed, did the Central acquire the River Road and the River Road lease the Junction Road. These are not distinct and independent matters, and complaint is directed at the illegality of the order and the necessary illegality of the acts of the corporate defendants in acting under an unlawful order. As illustrating this rule we call attention to the following cases:

In *United States* v. *Union Pacific*, 160 U. S. 1, 40 L. Ed. 319, the United States brought suit against the Union Pacific Railroad Company and the Western Union Telegraph Company. An act of Congress provided that railroads subsidized by the United States should maintain and operate telegraph lines and exercise alone all the power conferred upon them. The Union Pacific had been subsidized by the United States. The United States sought an injunction against the Union Pacific and the Western Union Telegraph Company on the ground that the Union Pacific conducted its business under contracts and agreements with the Western Union which were repugnant to the statute. Relief prayed for was, first, annulment of the contract, and, second, an order com-

pelling the Union Pacific to maintain and operate telegraph lines on its roadways as required by statute. The Telegraph Company urged that if the Railroad Company refused to comply with the statute, the remedy of the United States was in an action at law by mandamus and that equity was without jurisdiction to enforce compliance with the statutory conditions. This court said, on that point (page 50):

> "The United States is certainly entitled to the interposition of equity for the cancellation of the agreements under which the telegraph company asserts rights inconsistent with the Act of 1862 and the acts amendatory thereof, as well as with the Act of 1888. Jurisdiction in equity being acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the United States, the railway company, and the telegraph company, which relate to the general subject of telegraphic communication between the points named by Congress."

So in this case, it is clear that there is jurisdiction in this court to hear a complaint directed at the lawfulness of the order of the Commission. Jurisdiction being acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute growing out of and depending solely upon the lawfulness of the order; if it finds the order was unlawful, it may require the parties defendant to assume the status of May 15, 1922, and to vacate all acts taken in alleged conformity with the order.

In *Chicago, Milwaukee & St. Paul Railway Company* v. *U. S.*, 244 U. S. 351; 61 L. ed. 1184, the United States sought to enjoin the defendant railway company from constructing or operating its road through a national forest, unless it executed and filed with the Secretary of the Interior a stipulation required by that officer, and

also sought to obtain damages for timber cut and destroyed and injury done in the course of the construction and operation of the railroad. It was urged by the defendant that the bill was multifarious because there was coupled with a demand for equitable relief, a demand for personal judgment on purely legal claims. On this contention, Justice VanDevanter stated that the objection was so plainly without merit "that a discussion would serve no purpose."

In *Edmund F. Gaines, et ux.* v. *Chew*, 2 How. 619, 642; 11 L. ed. 402, 411, this court said :

> "It is well remarked by Lord Cottenham, in *Campbell* v. *Mackay*, (7 Simon 564), and in 1 Mylne & Craig 603, 'to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible.' Every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts."

Even though the bill be multifarious in that it seeks a remedy against the corporate and individual defendants, that is no ground for dismissing the bill. As was well said by the Commerce Court in the *Tap Line Case*, 209 Fed. 244, 251:

> "The petitioners in cases Nos. 90 and 91 seek not only to have the order of the Commission annulled, but pray also that the trunk lines may be ordered to perform certain contracts made with them. As this court is without jurisdiction to enforce such contracts, this additional prayer may be disregarded. Neither joining a cause of action over which this

> court has no jurisdiction with one over which the court has jurisdiction nor the joining of unnecessary parties defendant would, however, justify the dismissal of the petitions."

We would also call the court's attention to *United States* v. *Union Pacific*, 226 U. S. 61; 57 L. Ed. 124. In that case the United States sued to enforce the provisions of the Sherman Anti-Trust Act against certain alleged conspiracies and combinations in restraint of interstate commerce, growing out of the purchase by the Union Pacific Railroad Company of the dominant stock interest in the Southern Pacific. This court, in outlining the relief that should be granted, said (page 96):

> "In applying this general rule of relief we must deal with each case as we find it; and in the present one the object to be attained is to restrain the operation of and effectually terminate the combination created by the transfer of the stock to the Union Pacific Company. In that view the decree to be entered in the District Court shall provide an injunction against the right to vote this stock while in the ownership or control of the Union Pacific Company, or any corporation owned by it, or while held by any corporation or person for the Union Pacific Company, and forbid any transfer or disposition thereof in such wise as to continue its control, and shall provide an injunction against the payment of dividends upon such stock while thus held, except to a receiver to be appointed by the District Court to collect and hold such dividends until disposed of by the decree of the court."

It is a well-known rule of equity that the court having secured jurisdiction of the subject matter will proceed to do complete justice between the parties with respect to all things pertaining to that subject matter. This is for the purpose of avoiding a multiplicity of suits.

Justice would not be done merely by dismissing from this proceeding all the defendants other than the United States and simply enjoining, setting aside and anulling

the order of the Commission. In order for full justice to be done in the premises, the court must take such action as will set aside the unlawful acts of the defendants taken in accordance with the order of the Commission. The New York Central must divest itself of that control which it has taken under the permission granted by the Commission. The situation of the parties of May 15, 1922, should be restored. Without such action being taken, the full measure of relief to which plaintiffs are entitled cannot be had.

It will, therefore, be observed that if the court merely sets aside the order of the Commission and takes no action with respect to the things done thereunder by the other defendants, that numerous other suits must and will follow with respect to this same subject matter. Under these circumstances, the court, having properly secured jurisdiction of the bill praying that the order of the Commission may be set aside, should proceed to deal in this one proceeding with the entire subject matter, and should restore the *status quo* in order that the parties and the courts may not be put to the time and expense of litigating this same matter in other suits, entering such decrees as will wipe out the unlawful order and nullify all action taken thereunder.

5. Plaintiffs Have Not Been Guilty of Laches in Filing the Bill.

It will be observed that there is no provision in the statute which requires that a bill to set aside an order of the Commission shall be filed within any specific time. The order of the Commission was issued May 16, 1922; a petition for modification of the order was denied by the Commission June 12, 1922; bill herein was filed April 10, 1923. Only ten months elapsed from the denial of

that petition until the filing of the bill herein. It can not be denied that plaintiffs had an undoubted right to observe the manner in which the Central operated the properties acquired under the Commission's order. The rule has been well stated by this court in the following cases:

In *Halstead* v. *Grinnan*, 152 U. S. 412, 416; 38 L. Ed. 495, 497, this court said:

> "The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them."

In the case of *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 240; 66 L. Ed. 907, 920 this court said as to a contention that a bill brought by the United States was barred by laches:

> "The defendants contend that the suit is barred by laches on part of the government in failing to institute it earlier. Without deciding that this defense is available when an action is brought under an act of Congress embodying, as does the Sherman Act, an expression of public policy enforceable by criminal prosecution and by civil suit instituted by the Attorney-General, we are unable to discover that laches exists in the failure to more promptly prosecute the suit. The stock acquisition complained of was in 1899. In 1901 the Union Pacific acquired control of the Southern Pacific by purchase of sufficient stock to accomplish that purpose. The Union Pacific case was begun in 1908, and a final decree reached in 1913, and in 1914 this suit was begun."

The time between the entry of the order by the Commission and the filing of the bill in this case was less

than one year, while in the Southern Pacific case fifteen years had expired after the acquisition of the stock before suit was begun to set aside the acquisition.

Only upon a clear showing by the defendants that it would be inequitable to permit plaintiffs to now challenge the validity of the order, can the court sustain the plea of laches on the part of the plaintiffs. There is nothing on the present state of the record which even tends to show that any inequity will result to the defendants by reason of the delay of less than a year in bringing this suit. Plaintiffs have not been guilty of laches.

6. Courts Will Enjoin an Order of the Commission if the Same Is Unlawful in Any Respect.

The general rule as to the cases in which the District Court may enjoin an order of the Commission is stated in *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, 547; 56 L. Ed. 309, 311, where the court said:

> "In cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." (Citing cases.)

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power."

In *Interstate Commerce Commission* v. *Northern Pacific R. Co.*, 216 U. S. 538; 54 L. Ed. 608, this court passed upon an order which the Commission had issued establishing certain through routes and joint rates between eastern points and points on the Northern Pacific, and between Portland and Seattle via the Union Pacific Railroad. The carriers sought to have the order enjoined. The power conferred by the statute upon the Commission with respect to through routes and joint rates was conditioned by the proviso that "no reasonable or satisfactory through route exists." This court held that it had the right to inquire into the question of whether or not such reasonable or satisfactory through route existed since the existence or non-existence of the fact directly affected the jurisdiction of the Commission. After reviewing the evidence the court said (page 545):

> "The condition in the statute is not to be trifled with."

If plaintiffs are correct in their contention that the Commission violated the statute, defining the power of the Commission, this court has authority to enjoin such unlawful exercise of power.

7. The Order of the Commission Is Not a Certificate of Convenience and Necessity.

It is important to note the difference between the power of the Commission to attach terms and conditions to certificates issued under paragraphs (18) to (20) of Section 1, and authorization issued under paragraph (2) of Section 5. Under the former section the Commission "may attach to the issuance of the certificate such

terms and conditions as in its judgment the public convenience and necessity may require." Under the latter section the Commission may authorize an acquisition "under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." To the certificate the Commission can attach terms and conditions that will further the public convenience and necessity. Paragraphs (18) to (20) of Section 1 deal specifically with operation or engaging in transportation over an additional or extended line of railroad, which operation is supposed to be required by present or future public convenience and necessity.

Under paragraph (2) of Section 5 the Commission may authorize acquisition by one carrier of another carrier for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises. Doubt has been expressed as to whether "such terms and conditions as shall be found by the Commission to be just and reasonable in the premises" includes anything other than financial terms or conditions as to form and manner of payments, issuance of securities, etc.

For violation of the terms and conditions attached to the certificate of convenience and necessity under Section 1, a penalty is provided by a fine of not more than $5,000 or by imprisonment for not more than three years, or both. No such penalty is attached to a violation of the terms and conditions which may be attached by the Commission to the acquisition of control authorized by the Commission under paragraph 2 of Section 5. It has been urged by some that the failure to attach a penalty to a violation of the terms and conditions attached to the authorization under paragraph (2) of Section 5 was because the terms and conditions attached to such an

authorization were in the nature of consideration from buyer to seller for a violation of which the parties would be remanded to the civil courts.

If the Commission is without authority to attach conditions relating to operation to an authorization under paragraph (2) of Section 5, such as were attached in the present case, or if there be no penalty for a violation of such conditions, it becomes important to determine whether in the present case the authority granted could by any means be construed as a certificate of convenience and necessity under Section 1, for a violation of which heavy penalties are provided by statute. In the present case, the Commission found that acquisition of the Junction Roads by the Central would be in the public interest, if the 17 conditions named in the order are observed in the operation of the Junction properties. If these conditions are ineffective,—if there is no way in which compliance therewith can be compelled, then it would appear that the public interest will not be served by the acquisition authorized by the Commission.

We now proceed to a consideration of whether the order of the Commission is a certificate of public convenience and necessity within the meaning of paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act.

The form of the order in and of itself is a complete demonstration of the correctness of this contention. The order is set forth on pages 33 and 34 of the record. The finding of the Commission is contained on pages 24 and 25, wherein the Commission states:

> "Subject to the observance of the above conditions (seventeen conditions contained in the report of the Commission, pages 22 to 24), we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

The language of the order follows substantially the anguage contained in paragraph 2 of Section 5, which rovides that the Commission shall have authority by rder to approve and authorize such acquisition.

Paragraph 18 of Section 1 prohibits the acquisition of line of railroad unless and until there shall have first een obtained from the Commission "a certificate that ne present or future public convenience and necessity equire, or will require, the construction or operation," tc. Paragraph 20 of Section 1 gives the Commission ower "to issue such certificates prayed for or to refuse issue, or to issue it for a portion," etc.

In a concurring opinion, Commissioner Daniels points it that he concurs in the result reached in the re- ort, but states (Rec., 25):

> "I am, however, of opinion that the report should recognize explicitly that the application should have been entertained under Section 1, paragraph 18, of the Act, and that in accordance therewith a certificate of public convenience and necessity should be incorporated in the order entered.
>
> I am authorized to state that Commissioner Campbell concurs in the views expressed above."

In a dissenting opinion of Commissioner Eastman, ncurred in by Commissioner Cox, it is stated (Rec.,):

> "There is nothing in either the report or order of the majority that purports to be or is a certificate of public convenience and necessity and it must be assumed, therefore, that the order is based on paragraph 2 of Section 5."

Under paragraph 18, as construed by the Commission its conference ruling of April 8, 1921, applications der paragraph 18 of Section 1 "are confined to new es of railroad and extensions of lines of railroad be constructed, or put in operation in interstate or

foreign commerce, by carriers subject to the Act, subsequent to the effective date of the paragraph, and to lines of railroad in existence prior to that date which were not then being used in interstate or foreign commerce."

The Commission thus limited or interpreted Paragraph 18 so that it could not apply to a railroad which had been used in interstate commerce prior to the passage of the Act, leaving Paragraph 2 of Section 5 as the only source of authority which the Commission possessed to permit one carrier to acquire the property of another carrier.

The Commission later set aside and canceled its Conference Ruling of April 8, 1921, and until the decision in *Finance Docket No. 2919, Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company* (~~not yet~~ reported), of June 18, 1923, in no case so far as we are advised has the Commission issued a certificate of convenience and necessity applicable to lines of railroad which were in operation at the time of the passage of the Transportation Act. In that case the Commission issued a certificate of convenience and necessity in the following language:

> "*It is hereby certified* that the present and future public convenience and necessity require and will require the acquisition and operation by The New York, Chicago and St. Louis Railroad Company, a consolidated corporation of the states of New York, Pennsylvania, Ohio, Indiana and Illinois of the lines of railroad described in said application and report."

To this action of the Commission, Commissioner Eastman dissented in a vigorous opinion in which he was joined by Commissioners Esch and Hall. Commissioner Aitchison did not participate in the disposition of the case; Commissioner McChord was not present when final action was taken, but indicated that he favored the adop-

tion of the report. It will thus be seen that practically the same division among the Commissioners existed in the Nickel Plate as in the Chicago Junction case. The language of the certificate in the Nickel Plate case clearly establishes the contention heretofore made that there was no certificate of convenience and necessity issued in the Chicago Junction case.

The foregoing decision of the Commission discusses the power of the Commission to permit one carrier to acquire control of another carrier; we particularly call attention to the dissenting opinion of Commissioner Eastman, concurred in by Commissioner Esch.

Had a certificate of public convenience and necessity been issued in the Chicago Junction case, the conditions attached by the Commission would have been enforceable under heavy penalties provided by Section 1 of the Act. There is no such sanction in paragraph 2 of Section 5 of the Act.

4. Acquisition of Control (a) by the Central of the River Road by Purchase of Stock; and (b) by the River Road of the Junction by Lease, Involves a Consolidation of the Central, River Road and the Junction Into a Single System for Ownership and Operation; Authorization of Such Acquisition of Control is Beyond the Power of the Commission.

a. *The application filed with the Commission shows the purpose to make the Junction and River Road a part of the system known as the New York Central Lines.*

In the application filed with the Commission by the Central it is set forth in paragraph 4, page 4 (Rec., 56), that the New York Central Railroad Company is a consolidated corporation owning and operating certain main lines of railroad, with branches extending from New

York to Chicago, and that it will be in the public interest that the Central add to and enlarge, in the manner provided for in a certain agreement, its terminals and terminal facilities in the City of Chicago. In paragraph 7, page 12 (Rec., 61, 62), the applicant stated the reasons relied upon by it as showing that it will be in the public interest that the acquisitions, leases and conveyances be consummated. Paragraph (a) points out that the River Road, the Junction and the Union Stock Yards and Transit Company make an integral whole in railroad operation, and by their connections with the lines of many other railroads entering the City of Chicago, including the Indiana Harbor Belt and the New York Central Lines, they afford the means of transporting freight to and from the Stock Yards district and industrial territory.

Paragraph 7 (b) sets forth that the New York Central Lines operating at Chicago, including therein the New York Central, Michigan Central, Big Four and Indiana Harbor Belt, vitally need in order to serve the shipping public, additional downtown terminals in the City of Chicago, which can best be developed by the acquisition of the properties of the Junction and River Road, as set out in the petition. (Rec., 62.)

Paragraph 7 (c), page 16, sets forth (Rec., 64):

> "To unite in operation the stock yards group of railroads with the New York Central connecting line facility, namely, the Indiana Harbor Belt Railroad, and with the other railroad lines under the control of the New York Central group would promote the public interest to a high degree."

The application then points out the location of the Indiana Harbor Belt, and of the stock yards group of railroads, saying (Rec., 64):

> "These respective railroad facilities are thus complements each of the other and not competitors in

public service. Each lacks important facilities which the other has and which neither could secure for itself. Handled together, co-operatively, they will create a complete terminal unit, which will serve all the industrial territory tributary to each, with higher efficiency and will develop such territory in an accelerated degree."

The application then points out the advantages to be gained by such a co-operation. The application proceeds to point out that by virtue of the connection to be developed between the New York Central Lines and Indiana Harbor Belt with the Junction Roads (Rec., 64):

"Industries and shippers and the connecting railroads reached by the outer line would have a greater and more expeditious use of the less-than-carload facilities and of the Chicago delivery facilities afforded by the Stock Yards group.

On the other hand, the vast number of industries and shippers served by the stock yards group would gain materially by having thrown open to them the use of all of the terminal facilities of the outer group, namely, the Indiana Harbor Belt Railroad and other New York Central Lines and the use for railroad development of a territory contiguous to such railroads."

Further, after pointing out that the connecting line between the Indiana Harbor Belt and the Stock Yards Roads is very little used by the Indiana Harbor Belt, the application states (Rec., 65):

"Under co-operative management this connecting line would become a valuable and material addition to the stock yards group of railroads and in what is known as 'internal circulation.'"

Finally in this paragraph it is stated (Rec., 65):

"To unite these properties in a common operation with those represented by the New York Central Lines will afford relief in the above respect by giving instant access to a large field of outside terminals."

Further, in paragraph 7 (d) (Rec., 65-67) it is pointed out that the trunk lines of the New York Central groups having termini at Chicago are the New York Central, Michigan Central and Big Four. It is alleged that the terminal facilities of these trunk lines are not wholly inadequate to properly care for traffic now moving over their lines to and from Chicago and through the Chicago gateway, but are so limited in capacity as to impede or prevent the natural flow over their lines of a large amount of freight now moving to destination either at Chicago or elsewhere over circuitous routes.

The application then sets forth the respective terminals of the Lake Shore, Michigan Central and Big Four. It is asserted that (Rec., 67)

> "the development and enlargement of the terminal facilities of the New York Central Railroad Company, of the Michigan Central Railroad Company and of the Indiana Harbor Belt Railroad Company in the manner herein proposed would be of undoubted advantage to the Big Four Company in routing over its lines much traffic naturally destined to the same and now moving by circuitous routes. By adding the Chicago Junction Railway properties as terminals appurtenant to the above named New York Central trunk lines the reciprocal effect would be produced, or provided, on the one hand, for said carriers, greatly increased capacity and efficiency for delivering, receiving and developing traffic and, on the other hand, for shippers and consignees of freight, better service and additional direct routes in the transportation of the same."

In Paragraph 7 (e) it is distinctly stated that in the foregoing has been developed (Rec., 67):

> "By reason of continuity of location, connections and good will the great value of the stock yards group of railroads and the reciprocal benefit that would accrue to the shipping public and the New York Central group of railroads by adding to the same the stock yards group as terminals."

The foregoing allegations in the application were made in an effort to show that it would be in the public interest for the Commission to authorize the New York Central to buy all the capital stock of the Chicago River & Indiana Railroad Company and for the Chicago River & Indiana Railroad to lease for 99 years, renewable at its option in perpetuity, the property of the Chicago Junction Railway Company.

The bill of complaint alleges that the testimony of the applicant before the Commission was specific to the effect that the Junction roads were to be acquired as terminals for the New York Central Lines and as a part of the System known as the New York Central Lines. (Rec., 8. 9.)

(b) *The Junction and the River Road have been operated along with other carriers constituting the New York Central Lines, under a common control and management as a single system.*

By order of March 21, 1923, *In the Matter of Recovery and payment of excess railway operating income*, under the provisions of Section 15-a of the Interstate Commerce Act, each and every carrier by railroad within the continental United States, subject to the Interstate Commerce Act, was required, on or before May 1, 1923, to report to the Commission various matters set forth in the order showing net railway operating income and the amount by which the same for the year ended December 31, 1922, was in excess of 6 per cent of the value of the railway property, held for and used by it in the service of transportation. It was further ordered that in cases where two or more carriers constitute a group under common control and management and are operated as a single system, as provided in paragraph 6 of Section 15-a of the Interstate Commerce Act, the matters referred to

in the order should be reported for the system as a whole, irrespective of separate ownership and accounting returns of the various parts of such system.

It will be observed that there is a slight difference in language in paragraph (2) of Section 5 and in paragraph (6) of Section 15-a in reference to a system of railroads. In the former, the statute refers to carriers in "a single system for ownership and operation" while in the latter the system referred to is "a group of carriers which the Commission finds are under common control and management and are operated as a single system." The test for division of excess earnings under paragraph (6) of Section 15-a of the Interstate Commerce Act is common control, management and operation as a single system. The group of carriers may be operated under some form of dominion which might be less than "ownership." It is certain, however, that ownership would come clearly within the definition of "system" referred to in paragraph (6) of Section 15-a.

It will not be denied that at all times since the acquisition of the Junction Roads by the Central, the River Road and the Junction have been operated along with the New York Central Railroad, Big Four, Michigan Central and other New York Central Lines, under a common control and management.

Perhaps the Official Guide of the Railways can be judicially noted as a standard reference book of the railways of the United States; if so, in the December, 1923, issue, at page 128, will be noted a list of the various railroads composing the system "New York Central Lines." Included in this list are 16 separate entities, the last two being Chicago River & Indiana Railroad Company and Chicago Junction Railway (C. R. & I. R. R., lessee).

An inspection of the list of officers shown for the respective component parts of the System shows that all these 16 separate carriers are under the domination and direction of common officers. The policies of each of the component parts of the system, the operation and management of each, are all controlled by the executive head of the system; in the internal organization of the system there is a common head of each department,—law, finance, traffic, purchase; all these 16 separate entities are under the common control, operation and management of the same directing force.

In Section XI of the bill of complaint it is alleged that prior to July 13, 1922, the Central acquired control as authorized by the Commission, and that "the said Central and River Road have continually operated the said railroad properties as an integral part of, and for the benefit of, the New York Central System of Railroads." (Rec., 10.) On motions to dismiss that allegation of fact stands admitted.

(c) *The phrase "not involving the consolidation of such carriers into a single system for ownership and operation" applies alike to control* (1) *under a lease;* (2) *by the purchase of stock;* (3) *in any other manner.*

Paragraph 2 of Section 5 of the Interstate Commerce Act deals solely with acquisition of control by one carrier of another carrier. This paragraph provides:

> "Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or proprety subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by ord

> to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

This paragraph, of course, does not apply where control of one carrier by another carrier had been acquired prior to the passage of the Transportation Act, 1920; there appears no prohibition in this paragraph against a change in the form of control acquired prior to February 29, 1920, such for example, as would occur where a carrier owning the capital stock of a carrier desires to lease the properties of the latter carrier.

In Finance Docket No. 1108, *Securities Application of Pittsburgh & West Virginia Railway*, 76 I. C. C. 663, 667, the Commission said:

> "Without passing upon the question whether the transaction we are asked to approve amounts to 'the consolidation of such carriers into a single system for ownership and operation,' it is clear that under paragraph (2) of Section 5 we may only approve an application for, and authorize acquisition of, the control, in whole or in part, of one or more carriers by another carrier or carriers. That provision of the law looks to the future and has no application where complete control of one carrier by another already exists. Here, applicant owns every share of the capital stock of the Belt Company and no action that we might take could give it a more complete control of that carrier."

Acquisition of control may take several forms. It may be under a lease, it may be by the purchase of stock or it may be in some other manner. The statute names the two most common forms, viz.: (1) under a lease; and (2) by the purchase of stock, but in order that the statute should be all embracing it is specifically provided that in addition to the two common forms of control, the acquisition referred to shall include control "in any

other manner." It thus appears clear that Congress dealt with control in any form. The exception "not involving the consolidation of such carriers into a single system for ownership and operation," must apply to control either by lease, by purchase of stock, or in any other manner. It would be indeed strange that Congress would have no objection to a consolidation into a single system for ownership and operation, when the control was acquired by lease or by purchase of stock, but would have objection to the consolidation if it was acquired in any other manner.

In the construction and interpretation of statutes it should always be borne in mind that common sense must prevail over strict grammatical rules, and that relative and qualifying words and phrases should be given that application which the intention of the legislature, as derived from reading the section or statute as a whole, most clearly indicates.

In *Coxson* v. *Doland*, 2 Daly 66, a provision of the metropolitan police act of New York was involved. It provided that no member of the police force "shall be liable to military or jury duty, or to arrest on civil process, nor to service of subpoenas from civil courts, whilst on actual duty." It was contended that the words "whilst on actual duty" referred only to its immediate antecedent "nor to service of subpoenas from civil courts," and did not apply to the preceding phrases in the section.

The court held, however, that the words "whilst on actual duty" did apply to all the precedents in the section and was not limited to the immediate antecedent.

In *State ex rel. Crow* v. *St. Louis*, 174 Missouri 125, 61 L. R. A. 593, 73 S. W. 623, the following provision of the city charter was before the court:

> "The assembly shall not have power to relieve any citizen from the payment of any lawful tax, or to

> exempt him from any burden imposed upon him by law, or ordain the payment of any demand not authorized and audited according to law, nor shall the assembly have power to ordain or authorize the compromise of any disputed demand, or any allowance therefor or therein, except as provided in the contract therefor, or the payment of any damages claimed for alleged injuries to person or property, except by ordinance and adopted by a vote of two-thirds of the members of each house, taken by yeas and nays."

It was urged that the assembly was absolutely prohibited from doing any of the acts specified, except to ordain the payment of any damages claimed for alleged injuries to persons or property, and that it could not do the latter except by ordinance adopted by two-thirds of the members of each house taken by yeas and nays. In other words, it was contended that the words "except by ordinance and adopted by a vote of two-thirds of the members of each house taken by yeas and nays" applied only to its immediate antecedent and not to the whole section. The court held, however, that the clause applied not only to its immediate antecedent, but to the rest of the section since there could be no reason for any other construction. It was there well said that "the reason of the law is the life of the law."

The cases above cited support the proposition that qualifying words must be applied not only to the last antecedent but also to all precedents where the nature of the provisions and the obvious sense requires it.

So in the section here under consideration it would be absurd to presume that Congress intended to permit an acquisition which involves the consolidation of carriers into a single system for ownership and operation, if such acquisition was made by lease or purchase of stock and contemporaneously intended to prohibit such acquisition if made in any other manner.

A road which is not acquired under a lease or by the purchase of stock can be acquired by the purchase of the physical property, *i. e.*, the rails, equipment, land, etc., and we cannot perceive what reason there be in permitting the acquisition under a lease or by purchase of stock and prohibiting in the same section an acquisition by purchase of the physical property.

A common sense reading of this section can lead to but one conclusion, *i. e.*, that the qualifying phrase "not involving the consolidation of such carriers into a single system for ownership and operation" applies not only to acquisition "in any other manner" but as well to acquisition "under lease" and acquisition "by purchase of stock."

(d) *Consolidation is any form of union or combination whereby a single control is exercised over properties each of which was theretofore subject to different control.*

In arriving at the true meaning of Section 5 of the Interstate Commerce Act one needs only to apply ordinary rules of construction. What were the words used by Congress and what was the intent of Congress? If the words used are plain and unambiguous reference may not be made elsewhere to determine the meaning of Congress. The rule was well stated by this court in *United States* v. *St. Paul, Minneapolis & Manitoba Railway Co. et al.*, 247 U. S. 310, 318, 62 L. Ed. 1130-1134, as follows:

> "It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 318, 41 L. Ed. 1007, 1019, 17 Sup. Ct. Rep. 540. But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and

statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications. (Citing cases.)"

Hereafter, pages 72 to 77, we reproduce in the form of quotations from the Commission's decision *In the Matter of the Application of Pittsburgh & West Virginia Railway Company*, 70 I. C. C. 682, reference to the report of the House and Senate conferees and statements of Senator Cummins, chairman of the Senate Committee on Interstate Commerce, and Chairman Esch of the House Committee on Interstate and Foreign Commerce, from which it is clear that Congress intended that no form of consolidation, either into corporations or into systems, should be made until the Commission had announced its complete and final plan of consolidation provided for in paragraph (4) of Section 5 of the Interstate Commerce Act. There was good reason for this policy by Congress. If during the period contemplated by the Act for the Commission to perfect its plan of consolidation, carriers were permitted to pick out the desirable pieces of railway property which they wished to incorporate into their own system, it might become impossible for the Commission to so group the carriers of the country into systems as to meet the tests laid down by Congress in paragraph (4), viz.:

"The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which

the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties."

We think that Congress intended to hold railway systems in *statu quo* of February 29, 1920, until the Commission had perfected its plan of consolidation; after such plan had been perfected then such consolidations could be made as were in conformity with the Commission's plan.

With these purposes in mind we come now to consider the meaning of the provisions of Section 5, particularly paragraph 2 thereof, which authorized the Commission to permit one carrier to acquire another, if such acquisition did not involve consolidation of such carriers into a single system for ownership and operation. Our contention in the present case is supported both by the dictionary meaning of words used by Congress and by the interpretation which the Commission has made in other cases.

Webster's New International Dictionary defines "consolidate" as follows:

"To unite, as various particulars into one mass or body; to bring together in close union, to combine, as to *consolidate* the armies of the republic.

As synonyms: Unite, combine."

Webster's New International Dictionary defines the word "system" as follows:

"An aggregation or assemblage of objects united by some form of regular interaction or interdependence; a natural combination or organization of part to part, conceived as formed by a process of growth or as due to the nature of the objects connected; an organic whole; as, the solar *system;* a *system* of railways."

The Commission has defined "consolidation" as referred to in Section 5 of the Interstate Commerce Act, the leading case perhaps being *In the Matter of the Application of Pittsburgh & West Virginia Railway Company*, 70 I. C. C. 682 (decided Dec. 10, 1921). At page 684 the Commission states:

> "Technically, a consolidation is sometimes defined as a union of companies where a new corporation is created to take over the powers and property of the consolidating corporations. We are of the opinion, however, that the word 'consolidate' is not used in paragraph (6) in a narrow sense, but that the language of the paragraph is broad enough to cover any form of union under which 'properties theretofore in separate ownership, management, and operation' pass into the possession of a single corporation for ownership, management, and operation. This matter is not of immediate importance, for if the proposed purchase falls outside the terms of paragraph (6), it is certainly covered by paragraph (2), which deals with the acquisition by one carrier of the control of another 'either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation.' The question has a prospective importance, however, if we decide that authorization of the purchase is necessary under Section 5, for no such authority may be granted under paragraph (6) until we have adopted a plan of consolidation under paragraphs (4) and (5), while there is no similar limitation upon action under paragraph (2).
>
> But applicant has not sought authority for the purchase and sale under Section 5, and the immediate question, as aforesaid, is whether the transaction can lawfully be consummated without such authorization. Two constructions of the above-quoted provisions of that section are possible. One interpretation is that they represent an attempt on the part of Congress to place in our hands complete control over the union of carriers engaged in interstate commerce; the other is that they are merely a means of affording relief from the operation of the 'anti-

trust laws,' or other restraining State or Federal statutes.

Section 5 is a unit, its separately numbered paragraphs dealing with analogous matters. Paragraph (1), which has to do with the pooling of freights and the division of earnings, begins as follows:

'(1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of Section 1 of this Act, it shall be unlawful for any common carrier, subject to this Act to enter into any contract, * * *'

It is thus definitely and unmistakably provided that an agreement for the pooling of freights or the division of earnings shall be unlawful unless and until it receives our specific approval. The corresponding language of paragraph (2), which deals with union of carriers not involving consolidation into a single system for ownership, management, and operation, is not so easily construed. It contains no specific prohibition, but provides that whenever we are of opinion that it will be in the public interest, we shall have authority by order to approve and authorize such union. The language of paragraph (6) is similar, for while it specifies the conditions under which consolidations 'shall be lawful,' it does not in terms state the conditions under which they shall be unlawful.

The provisions in question were made a part of the interstate commerce act by the transportation act, 1920. In case of ambiguity it is permissible, in interpreting a statute, to refer to the reports of Congress. The final draft of the transportation act, 1920, was the result of a conference between the Senate and House committees. In the report of the House conferees, February 8, 1920, it was said:

'The House bill permitted consolidations, mergers, and pooling of earnings or facilities, subject to the approval of the commission, and for the purpose of carrying out any order of the commission approving a consolidation, merger, or pooling declared that the carriers affected by such order should be relieved from the operation of the anti-trust and other restrictive or prohibitory laws. The Senate amendment in Section 9 declared that it is the policy

of the United States to require consolidation of all the railroads of the country into not less than 20 nor more than 35 separate systems, and provided (Sec. 10) that the transportation board should prepare a plan for such consolidation. Voluntary consolidations were provided for within the period of seven years after the passage of the act, but at the end of that period the transportation board was given power to compel such consolidations. The Senate receded from the provisions for compulsory consolidation and agreed to the House provisions with respect to pooling, as revised by the conferees. The House agreed to the Senate provisions for voluntary consolidations as revised by the conferees in Section 407 of the conference report. Under these provisions the commission is authorized to permit the acquisition by one carrier of the control of another by lease or purchase of stock. The commission is directed to prepare a plan of consolidation, preserving existing routes and competition so far as possible. Before adopting such plan the commission is required to give a hearing and notify the governor of each state affected. *Consolidations or mergers in harmony with the commission's plan are permitted subject to the approval of the commission and subject to the requirement that the capital of the consolidated corporation shall not exceed the value of the consolidated properties as determined by the commission.* An order of the commission approving a specified consolidation may be carried out notwithstanding any State or Federal restraining or prohibitory law to the contrary. (Italics ours.)'

In making the report for the Senate conferees, Senator Cummins said, on February 23, 1920:

'In so far as the Senate bill contemplated compulsory consolidations, the Senate conferees have found it necessary to recede, but the real principle embodied in the Senate bill has been preserved. The substitute found in the conference report upon this subject provides that the commission shall, as soon as practicable, adopt and publish a plan for the consolidation of our railways into a limited number of systems, with the same requirements as to competitive service and the observance of existing routes of commerce as were laid down in the Senate bill.

With the approval of the commission, guided solely by the public interest, consolidations are to be permitted, but they are to be voluntary and must be consistent with and in furtherance of the plan adopted by the commission. Furthermore, in whatever consolidations may take place, the properties consolidated must be treated as of their true value, and the commission is charged with the duty of determining this value under the valuation act of 1913. (Italics ours.)'

Still more definite were the remarks of Chairman Esch, of the House committee, on February 21, 1920:

'No consolidation can hereafter be made unless it complies with the plan as prescribed by the commission. We have safeguarded this matter of consolidation in every possible way.'

Aside from this extraneous evidence, the intent of the provisions may, we think, be determined by reference to internal evidence. Paragraphs (4) and (5) provide most elaborately for the preparation and adoption by the commission of a 'plan for the consolidation of the railway properties of the continental United States into a limited number of systems.' In the division into such systems 'competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained.' It is further provided that the 'several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.' When we have agreed upon a tentative plan of this character, it must be given 'due publicity,' including notice to the Governor of each State, and all persons must be heard who may file or present objections. Thereafter, and not until then, the final plan may be adopted and published.

Obviously, the preparation and adoption of a plan of consolidation under such instructions from Congress require deliberate and careful consideration

of every railway property of the 'continental United States' from competitive, financial, commercial, and other points of view, so that each such property may with nicety be fitted into its appropriate place in the final scheme. Obviously, also, many consolidations which are not barred by the restraining provisions of the 'anti-trust laws' or other Federal or State statutes may be wholly inconsistent with the plan and destructive of its purpose. Yet, if consolidations of this kind can now be lawfully effected without our approval, the conclusion is inevitable that the carriers may ignore section 5 with impunity under similar circumstances, after the plan has finally been adopted, and thus bring quick disaster to its entire structure. It is impossible to believe that it was the intent of Congress to prescribe with such care the method by which this elaborate and comprehensive program shall be formulated and the principles by which it shall be governed, and at the same time leave open a door by which at any time it may be wrecked.

And the same may be said of the intent of paragraph (2), for if carriers are permitted to gain control of one another without our approval by means falling short of consolidation and in a manner which is out of harmony with the ultimate plan of consolidation, to that extent the difficulties in the way of the consummation of the plan will be increased and the probability will be diminished that it may ultimately be accomplished through voluntary action of the carriers.

Beyond question, in the development of the transportation act, 1920, as a constructive measure for the solution of the railroad problem, great importance was attached by Congress to the ultimate consolidation of the carriers into a limited number of great systems, well balanced financially and of similar earning power, but competing with each other and maintaining the existing channels of trade and commerce. In our opinion it was the intent of Congress that complete control over the situation should be in our hands, so that the working out of this constructive policy might be safeguarded in every possible way, and so that consolidations or other union

of interests might not be effected without our consent.

Nor is the language of Section 5 inconsistent with this conclusion. In Lewis' Sutherland on Statutory Construction it is said, at pages 1149-1150:

'A direction contained in a statute, though couched in merely permissive language, will not be construed as leaving compliance optional, when the good sense of the entire enactment requires its provisions to be deemed compulsory.'

But it is unnecessary to rely upon this principle of construction, for when, in paragraph (6), it is provided that 'it shall be lawful' to consolidate under certain conditions, this is but another way of saying that consolidations in disregard of those conditions shall be unlawful. And in like manner, when it is provided in paragraph (2) that we may authorize the acquisition by one carrier of control of another in any manner falling short of consolidation, whenever we are of opinion that such acquisition 'will be in the public interest,' this is equivalent to saying that authority for the acquisition shall not exist under other conditions.

If it had been intended that these provisions of Section 5 should merely afford a means of escaping from the restraints of the 'anti-trust laws' and other State or Federal statutes, much simpler machinery would have been devised for accomplishing the purpose. The 'plan of consolidation' is incompatible with such an interpretation of the section and embodies a policy of far greater breadth and vision."

In the Commission's report on *Consolidation of Railroads*, 63 I. C. C. 455, at page 635, in the resume of consolidation policy, Professor Ripley outlines the objects sought in the tentative plan proposed by the Commission as follows:

"An inherently natural geographic scope for each system; a sound operating adaptation of each unit to its surroundings, due consideration being given to the nature of its traffic; administrative practicability, that is to say, a size under each particular set of circumstances, commensurate with human capacity in management; an ever-present competition

between rival roads, in order to insure the continuance of an alert and accelerated service to the public, assuming that the foregoing physical arrangements have already provided economical carriage by each competitor; and such an equalization of earning capacity between these competitors, as to perpetuate such rivalry in service on an even-handed and wholesome basis. This ideal has been otherwise well described by Chairman Clark of the Interstate Commerce Commission, as a service 'rendered by large systems with their component parts properly coordinated under a common policy rather than by a substantial number of weaker and, in some instances, impecunious systems, each with its selfiish interests and its separate organization striving to promote those interests.' All of these requisites for a sound consolidation plan, it should be understood, must of necessity be combined with the least possible disturbance of existing corporate integrity."

In the Commission's tentative plans for *Consolidation of Railroads*, 63 I. C. C. 455, at page 483, it is said:

"Another far-reaching assumption is vital to the success of this plan. This has to do with the operation of terminals at great centers. Historically, there has been the greatest diversity of experience in this regard between the carriers of the country. Some roads are peculiarly fortified as to terminals, while possessing weak lines from an operating standpoint across the open country. For others, the reverse is true. Some companies, entering the field late, enjoy good locations as to line, but have always worked under a handicap at the terminals. Such lines are strong in the open but weak at the ends. Others—The Atlanta, Birmingham & Atlantic, for example—were really constructed across country rather to utilize an existent terminal than because of a demonstrated need for the new cross-country line. But whatever the cause for the existing situation, a practically universal demand of shippers is that they be able freely to exercise their routing rights by the provision of open terminals, both at the point of shipment and at destination. The right of route across country is impaired if the only possible delivery is at an inconvenient point. To put

together railway lines on the map without having a constant regard to the possibility of free delivery or receipt at either end would indeed be futile. As to the particular means for accomplishment of this object—free and untrammeled utilization of terminals—there may well be difference of opinion. Conceivably, joint ownership and operation, as at St. Louis, may succeed in that environment, while reciprocal switching may satisfactorily answer the purpose as at Chicago. But, whatever the means adopted to this end, it is submitted that a proper adjustment of the various terminal situations, always of course for due compensation, is an important adjunct to any comprehensive consolidation plan. No recommendation, therefore, as to particular terminal remedies is offered in this report. The subject technically is so involved, that it might well be made matter for a special investigation. Its bearing upon and relation to the subject of the division of through rates is as obvious as is its intimate connection with consolidation. The pending New York Central application to acquire the Chicago Junction Railway raises in itself almost all the possible aspects of terminal problems. Consolidation can never be effectively brought about without the adoption of a comprehensive policy as to terminal ownership, operation, or both. It is herein assumed that free access will be somehow provided, either under the present emergency powers as contained in Section 1, Paragraph 15c, or by the adoption under a consolidation plan of permanent arrangements in all of the important centers. Possibly the assignment of terminal properties might take place by means of leases based upon valuation by the Commission and at a rate fixed by the Commission as reasonable. This would permit the terminal companies to remain under the joint control of the several participating railroads, rather than that entirely independent terminal companies, actually owning these facilities, should be set up. The important point, whatever the means adopted to this end, is that there should be unified operation and entirely free access to all participants alike."

In line with this policy, in the same opinion, the Com-

mission in announcing its finding of the New York Central System, page 456, excluded the Indiana Harbor Belt, now controlled by the New York Central 30 per cent, Michigan Central 30 per cent, Chicago & Northwestern 20 per cent, and Chicago, Milwaukee & St. Paul 20 per cent, saying: "The Indiana Harbor Belt is reserved for consideration in connection with terminal situations."

What the Commission regards its power to authorize consolidations into *systems* and into single corporations appears in the following decisions.

We find it impossible to harmonize the action of the Commission in the report and order here under attack with action which it has taken in other cases where applications were made under paragraph (2) of Section 5.

In Finance Docket No. 2592, *Merger of Subsidiary Companies with Boston & Maine*, 76 I. C. C. 797, the Commission dismissed the application of the Boston & Maine Railroad for authority to acquire by merger the corporate property, rights, credits and franchises of various subsidiary companies, at least a majority of whose capital stock was owned by the applicant, as being beyond the power of the Commission under paragraph (2) and as premature under paragraph (6). The Commission said (page 799):

> "If the applications be treated as having been filed under paragraph (2) of Section 5 of the Interstate Commerce Act, we are of the opinion that that paragraph does not confer upon us the power to approve or authorize the proposed transactions. The contemplated mergers would involve the consolidation of the applicant and the subsidiary companies into a single system for ownership and operation and, therefore, we are without jurisdiction under that paragraph to approve or authorize the same.
>
> If the applications be considered as having been presented under paragraph (6) of said Section 5 they cannot be entertained by us at the present time. That paragraph confers upon us jurisdiction to ap-

prove a proposed consolidation of the properties of two or more carriers into one corporation for ownership, management, and operation, but it provides that the proposed consolidation must be in harmony with, and in furtherance of, the complete plan of consolidation mentioned in paragraph (5) of said section. While we have agreed upon the tentative plan of consolidation provided for by paragraph (4) of that section, and given due publicity thereto, the hearings which we are required by said paragraph (5) to hold thereon have not yet been brought to a close and the complete plan of consolidation has not yet been adopted by us. We are of the opinion, therefore, that the filing of the applications was premature if it was intended thereby to invoke our jurisdiction under said paragraph (6).

* * * * *

There is, we believe, no provision of law pursuant to which we may at this time approve or authorize the proposed mergers, and it follows that the applications should be dismissed."

In Finance Docket No. 1881, *In the Matter of the Application of the Western Pacific Railway Company for Authority to Acquire Control of the Sacramento Northern Railroad and to Purchase its Bonds*, 71 I. C. C. 653, the Commission denied the application for the reason that until application has been made under Section 20-a of the Interstate Commerce Act for authority to issue capital stock, and to assume obligations of the old company, the Commission was unable to pass upon the question of public interest involved in the acquisition of control of such company by the Western Pacific. In the course of its opinion, the Commission said:

"It is asserted that the lines of the (Sacramento) Northern will be 'independently' operated by a separate operating organization. The record shows unquestionably, however, that the new company would be merely an instrumentality of the Western Pacific organization, responsive necessarily to the policies established by it and operated primarily in its interests. The acquisition of control by the applicant

under the circumstances proposed would *ipso facto* establish the status of the new company as part of the Western Pacific system and so long as the control continued its operation would necessarily be as part of that system. See *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498."

Thereafter, on July 2, 1923, 79 I. C. C. 782, on an additional record on rehearing, the Commission reaffirmed its findings, and in greater detail discussed the question of whether, if the application of the Western Pacific were granted the Sacramento Northern Railway would be operated "as a part of a general steam railroad system of transportation." After pointing out that the record showed that the proposed acquisition was for *system purposes*, the Commission said: 788

"The term 'system' is comprehensive. A reference to the lines of the New York Central Railroad Company might be regarded as restricted to lines owned by such company. A reference to lines of the New York Central System, however, would include the numerous lines controlled by the New York Central Railroad and operated *as part of* that system, even if operated by organizations separate from that operating the New York Central Railroad Company lines proper. In the original report in the present case adopted by division 4, reference was made to *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 210 U. S. 498, as an authority for the proposition that the new Sacramento Northern company would henceforth be merely an instrumentality of the Western Pacific organization, responsive necessarily, to the policies established by it, and operated primarily in its interests, and therefore operated as part of its system. The facts of this case are discussed more at length in the report of the same case before the Commission, *Eichenberg* v. *Southern Pacific Company*, 14 I. C. C. 250, 265. * * * After pointing out that the Galveston, Harrisburg & San Antonio was also controlled by the Southern Pacific Company, we said, on page 265:

'It is true that the different corporations under consideration are operating under separate and dis-

tinct charters, but, nevertheless, they constitute a single system. To complete that system the Terminal Company is a necessary part. * * * The Terminal Company is part and parcel of the system engaged as a whole in the transportation of commerce, and to the extent that such commerce is interstate, the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all their terminals and terminal facilities from our regulating authority.'

Referring to the fact that the terminal company and the rail carrier paid each other for the respective services performed by each for the other, we said, on page 266:

'It is true that the latter collects a trackage charge from the former and that the railroad company collects a switching charge from the Terminal Company. These charges are, however, but incidents of *the separate corporate operations.*' (Italics ours.)

In the case before us, it is pointed out that there will be divisions of joint rates between the Sacramento Northern and the Western Pacific in the future as now and formerly. In our opinion, this has no more bearing upon the question of system control and operation that the payment of switching and trackage charges had in the Southern Pacific Terminal Case.

The Supreme Court, after reviewing the facts in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission, supra*, said on page 521:

'Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation *through* the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the terminal company is a wharfage company, or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the terminal company have

united them into a system of which all are necessary parts, the terminal company as well as the railroad companies.' (Italics ours.)

And again, on page 523:

'In opposition to these views appellants urge the legal individuality of the different railroads and the terminal company, and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely, or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it.'

Bearing in mind that the terminal company was in fact separately operated by a separate organization from the railroad company and from the holding company, the statement of the Supreme Court that 'there is a union of them if we regard their control and operation *through* the Southern Pacific Company' is very significant. The fact of separate operation afforded no hindrance to the conclusion that the separate companies were operated as part of one system. 'They are directed by the same paramount and combining power and made single by it.'

Applying this reasoning to the case before us, it is impossible to escape the conclusion that the Sacramento Northern will be operated as part of the Western Pacific System. The statements made by the applicant as to economies to be effected by changing points of interchange, by joint solicitation of traffic, by joint use of tracks and terminal facilities, and the statement made as to the necessity for the acquisition of the Sacramento Northern by the Western Pacific, and the intention to use the Sacramento Northern lines as a feeder to the Western Pacific, giving the latter access to important points which the Western Pacific does not now reach, all

go to show that the proposed acquisition is for system purposes, and that the lines, if acquired, would henceforth be operated as part of the Western Pacific system, which is a general steam railroad system of transportation within the meaning of the statute."

The foregoing citations to decisions of the Commission indicate a closer appreciation of the Congressional intent than is evidenced in the report and order here under consideration.

In Finance Docket No. 2613, *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508, the Commission approved and authorized acquisition of control by the Southern Pacific of the Central Pacific Railway Company by lease and stock ownership. In that case application was filed by the Southern Pacific Company for authority under Paragraph (2) of Section 5 of the Interstate Commerce Act to acquire control by lease and stock ownership of the Central Pacific Railway Company, a copy of the proposed lease being filed with the application. The application recited that the occasion therefor was the decision of this court in *United States* v. *Southern Pacific et al.*, 259 U. S. 214, holding that existing control by the Southern Pacific of the Central Pacific was prohibited by the federal anti-trust act of July 2, 1890, known as the Sherman law. On page 524 of the Commission's decision it is stated:

"The question has been raised as to whether an acquisition of control under the circumstances proposed amounts to a consolidation of the carriers concerned 'into a single system for ownership and operation,' as to which type of control we have no jurisdiction under paragraph (2) of Section 5. We have given consideration to the question and find that an acquisition of control consummated as proposed and exercised subject to the conditions to be imposed by our order herein, does not involve the consolidation of such carriers into a single system

> for ownership and operation. It is not enough to constitute such a consolidation that the carriers or their properties be consolidated into a single system for operation, or for management, or for management and operation, but it must also appear that they are consolidated for ownership. Since each of the carriers will retain its corporate identity and the legal title to its property, no consolidation of the kind defined by the statute will result."

In the concurring opinion of Commissioner Eastman, it is pointed out that the control authorized by the Commission's decision differs from that which had been authorized in other cases, in that the control was held subject to a contingency named in the order, viz., "that the control herein authorized by lease and stock ownership shall be held subject to termination by order of the Commission if and when found by this Commission to interfere with the consummation of its complete plan of consolidation under the provisions of Section 5 of the Interstate Commerce Act." This court will recall that in its decision in the *Southern Pacific Case*, 259 U. S. 214, at page 232, it had found a common ownership and control amounting to practical consolidation. We can not find in Paragraph (2) of Section 5 any limitation as to the period during which the consolidation into a single system may continue. That there is a possibility that the Commission might at some future time revoke the authority granted to the Southern Pacific cannot affect the degree of consolidation resulting from the acquisition authorized by the Commission.

One of the sources for light upon the meaning of terms in a Congressional enactment is judicial definition prior to such enactment. Let us see what was the judicial interpretation of "consolidation" and "system" prior to the passage of Act under consideration.

In the case of *East St. Louis Connecting Railway Co. et al.* v. *Jarvis*, 92 Fed. 735, Circuit Court of Appeals for

the Seventh Circuit, held that the lease of the Venice & Carondelet Railway Company to the East St. Louis Connecting Railway Company for ten years was a "consolidation" within the meaning of Article 11, Section 11, of the Constitution of Illinois, which provides that:

> "No railroad corporation shall consolidate its stock, property or franchise, with any other railroad corporation owning a parallel or competing line."

At page 743 the court said:

> "Is a lease for 10 years a consolidation of the franchises or property, within the constitutional provision? It is contended that the term 'consolidation' means a permanent union of the interests, management, and control of two roads, either in the formation of a new company out of the consolidated one, or else by consolidated management of the old ones unitedly while their distinct corporate entities still remained. This distinction is true in the general sense in which one speaks of the 'consolidation' of railroads. The term may also mean the act of forming into a more firm or compact mass, body, or system. The constitutional convention, representing the people of the State, sought to provide against monopolies, and to preserve to the public the benefit that would accrue from competition between parallel or competing lines of railway. It sought for practical results. It intended to provide that parallel or competing lines should continue to be competing, and this it aimed to accomplish by prohibiting the consolidation of the stock or the franchises or the property of any such competing lines of railway. The union of such lines was prohibited, in view of the objects sought to be accomplished. The term 'consolidate,' we think, must be construed to have been used in the sense of 'join' or 'unite.' To permit two such competing lines of railway under a single management and a single control would accomplish the very purpose which the constitution sought to prevent. We must have regard to the spirit and the object of that constitutional provision, and not juggle with the technical meaning of the word. The prohibition goes to the

consolidation or uniting of the stock of two competing roads, or of the franchises of two competing roads, or of the property of two competing roads. The doing of either would create the prohibited monopoly, and either is within the intendment and meaning of the constitutional provision. Nor do we think that there is force in the contention that this union or consolidation was by means of a temporary arrangement, if thereby that is accomplished which is prohibited by the constitution. If it be lawful, by means of a lease for 10 years, to consolidate and unite the properties of competing lines of railway, we perceive no reason why a lease for 99 years would not be equally valid. We cannot draw the line in that respect between what is permanent and what is temporary. Whatever produces the prohibited result is obnoxious to the spirit and the letter of the constitutional provision, and is illegal. We must deal with the result accomplished, without regard to the means employed. It cannot be permitted that one may effect a prohibited result by indirection which he may not lawfully accomplish by direct means. We must therefore hold that the leases in question practically effected a consolidation of the properties of two competing lines, and are within the inhibition of the constitution. *Morrill* v. *Railroad Co.*, 55 N. H. 531; *Gulf, C. & S. F. Ry. Co.* v. *State*, 72 Tex. 404, 10 S. W. 81; *State* v. *Atchison & N. R. Co.*, 24 Neb. 143, 38 N. W. 43."

In *United States* v. *Southern Pacific Company, et al.*, 239 Fed. 998, the District Court, Sanborn, Hook and Carland sitting, dismissed a bill by the United States against the Southern Pacific, et al. In the course of the opinion the court frequently referred to the Southern Pacific System as the Southern Pacific Lines. The court traced the history of the Central Pacific and Southern Pacific Companies. At page 1000 the court points out that the Central Pacific was dominated and controlled by certain men who were in that year, if not earlier, in control of the Southern Pacific, saying:

"For at least fifteen years thereafter, and during the most important constructive period of the Southern Pacific, a common control and dominance over both companies was exercised by them or the representatives of their estates. * * * Except as to corporate title and bookkeeping, there were generally the aspects of a single enterprise. In this respect the conditions were not unlike those which have characterized the growth of many of the important railroad systems of the country in which for necessity or convenience of financing and in some instances because of local laws, separate corporate organizations were utilized. * * * Up to 1885 all the Southern Pacific railroads, including the main line to New Orleans (with an unimportant exception), were officially announced, advertised, and operated by the Central Pacific as part of its system. The legal relation between the two companies was expressed in executed leases, and the system was known as 'Central Pacific Railroad and leased lines.'"

On appeal to this court, *United States* v. *Southern Pacific*, 259 U. S. 214, 66 L. Ed. 907, the decree of the District Court dismissing the bill was reversed. This court reviews the facts and points out the manner in which the Southern Pacific System was developed. It is particularly pertinent to observe the language of the opinion after pointing out what was said by the District Court, that perhaps as early as 1870 the same group that controlled the Central Pacific gained control of and continued to dominate the policy of the Southern Pacific (page 232):

"The roads were always separate and distinct corporations; they were so recognized in the acts of Congress making land grants to them, authorizing their construction and operation from one State or Territory to another, and otherwise conferring rights on them which only Congress could confer. For a good part of the time the roads had boards of directors not consisting of the same persons. At times the majority of the stock was separately held.

> In the Central Pacific, when the lease of 1885 to the Southern Pacific was made, only one-fourth of the stock was held by the group to which we have referred. It had been sold and was widely owned in the United States and Europe. The dominating control was maintained from the fact that the stock had not been transferred by its true owners on the company's books, and much of it was held in the name of employes who were used in voting it by the original promoters, their successors and survivors.
>
> We can not accept the theory of prior practical consolidation as a justification for a violation of the Sherman Act resulting from the stock control acquired in 1899."

It is clear from this quotation that notwithstanding separate corporate entity the Southern Pacific and Central Pacific had been consolidated into a single system. Applying this precedent to the present case it is clear that the River Road and Junction have been consolidated into the New York Central System.

In the *Northern Securities Case*, 193 U. S. 197, 48 Law Ed. 679, this court ordered the dissolution of the Northern Securities Company, a holding corporation, which had been formed to hold the stock of the Great Northern and Northern Pacific. In the course of the opinion the court refers to the ownership of stock and answers the contention that Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce. The decree in that case against the Northern Securities Company and its officers, agents, servants and employes, is very similar to that which we are asking in the present case. There the court molded its decree so as to accomplish practical results—such results as law and justice demanded.

In the concurring opinion of Mr. Justice Brewer, after

pointing out that a corporation is an artificial person, created and existing only for the convenient transaction of business, it is further stated (page 362):

> "In this case it was a mere instrumentality by which separate railroad properties were combined under one control. * * * If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation."

In the dissenting opinion of Mr. Justice White, with whom concurred Chief Justice Fuller, Justice Peckham and Justice Holmes, there is reviewed the development of systems of railroad. That opinion points out (page 375, 48 L. Ed., 715):

> "It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases, and consolidations under the sanction of state laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under state authority, sometimes by such leases made where there was no prohibition against them, and by stock acquisitions made by persons or corporations in order to acquire a controlling inter-

> est in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston & Maine system, the New York, New Haven & Hartford, the New York Central, the Reading, and the Pennsylvania systems. One of the illustrations—as to the New York Central System—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other,—both parallel roads and directly competitive, and both united in one management by authority of a legislative act. * * * As a matter of public history it is to be observed that not long since by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston & Albany road passed to the New York Central System."

Upon the foregoing, so far as expressions of fact are concerned, there was no indicated difference of opinion among the justices of the court. The dissent was wholly as to the power in Congress to control ownership of stock. The dissenting opinion, as well as the majority opinion, fully recognizes that consolidations could be made either by leases or by stock ownership.

In the case of *Chicago, Milwaukee & St. Paul Railway Co. et al.* v. *Minneapolis Civic and Commerce Assn.*, 247 U. S. 490; 62 L. Ed., 1229, this court held that the rule that ownership alone of capital stock in one corporation by another does not create an identity of corporate interest between the two companies, or render the stock holding company the owner of the property of the other, or create the relation of principal and agent or representative between the two, is not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of the corporation in the normal and usual manner, but for the purpose of con-

trolling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies. This decision of this court is peculiarly significant when we consider that in the application filed by the Central with the Commission it is expressly stated that it is desired to acquire the River Road and the Junction as terminals for the lines constituting the System known as the New York Central Lines.

In *Louisville & Nashville Railroad Company* v. *Kentucky*, 161 U. S. 677, 40 Law Ed., 849, this court affirmed an opinion of the Court of Appeals of Kentucky which held unlawful a consolidation effected by the Louisville & Nashville acquiring control of the capital stock, franchises and property of the C. & O. Southwestern, and other railway lines in Kentucky. The state court had held the proposal to violate Section 201 of the State Constitution of Kentucky, which provides:

> "No railroad, telegraph, telephone, bridge, or common carrier company shall consolidate its capital stock, franchises, or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge, or common carrier company owning a parallel or competing line or structure."

In that case, the consolidation referred to in the opinion was to be brought about by purchase of capital stock, as well as by purchase of physical properties. The consolidation referred to was the bringing together of theretofore separate properties under the management and direction of the Louisville & Nashville.

The foregoing opinions clearly indicate that the use of the word "consolidate" or "consolidation" implies the bringing together under a single control, either by lease, purchase of physical property, or acquisition of the stock of a holding company which in turn holds the stock or properties of subsidiary corporations. That this is so

is abundantly shown by the fact that in paragraph (6) of Section 5 the Congress deals specifically with the consolidation into a single corporation, while in paragraph (2) the consolidation is into a single system.

Under Paragraph (2) of Section 5 the Commission may authorize acquisition of control only in a "manner not involving the consolidation of such carriers into a single system for ownership and operation," so that the Commission's order in this case was beyond its authority if it allowed consolidation into a single system for ownership and operation even though such consolidation fell short of the consolidation provided for by Paragraph (6) of Section 5 "into one corporation for the ownership, management and operation of the properties."

Clearly Congress had in mind in its reference to system of railroads, the union of various lines of railroad under a common directing head so that the returns upon the investment and the relationship to the public and to other railroads would be in one common central control. The New York Central Railroad Company is the principal corporation in the system. While that corporation does not own all of the stock of all of the system line corporations, it does own all of the stock of the River Road.

9. The Order of the Commission Is Void if It Authorizes the Consolidation of the Properties of the River Road and the Junction Road Into a Single Corporation in Violation of Paragraph (6) of Section 5, Because the Commission Had Not (Has Not Yet) Perfected Its General Plan of Consolidation.

We have already seen that the effect of the Commission's order is to permit the River Road to lease the physical properties of the Chicago Junction Railway Company for 99 years, renewable in perpetuity at the

option of the River Road. Paragraph (6) of Section 5 provides:

> "It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions: (a) the proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission;" (Here follow other conditions).

We come first to a consideration of whether the consolidation is of properties "theretofore in separate ownership, management and operation." The properties acquired by the River Road under the lease were owned (a) by the Chicago Junction Railway Company, in part, and (b) by the Union Stock Yards & Transit Company in part. All the stock of the Chicago Junction Railway Company and the Union Stock Yards & Transit Company was owned by the Chicago Junction Railways and Union Stock Yards Company, a New Jersey holding company. The railway properties of the Chicago River & Indiana Railroad Company were owned by that corporation, the stock of which was owned in equal parts by Richard Fitzgerald, an individual, and the Chicago Junction Railways and Union Stock Yards Company. These two railroads were separate properties, separately owned, operated and managed. These corporations made separate reports to the Commission and in every way were in separate ownership, management and operation. Separate ownership, operation and management of the Chicago Junction and Chicago River & Indiana Railroad properties, is set forth on pages 4 to 7 of the application to the Commission. (Rec., 57.) The only corporation that is to own the consolidated properties is the Chicago River & Indiana Railroad Company.

If it be urged that control by a lease for 99 years, renewable in perpetuity at the option of the River Road is not "ownership by the River Road," we reply that we must have regard to the spirit and the object of the statute and not juggle with the most refined technical meaning of the word. If control of railway property may be acquired by a corporation under a lease for 99 years renewable at its option in perpetuity without complying with paragraph (6) of Section 5 a way is open to carriers to bring about by this device the very result which Congress attempted to prohibit. Such a construction of the statute is not possible of justification. What more effective consolidation can be made than is authorized by the second paragraph of this order of the Commission?

It is thus plain that the lease for 99 years, renewable in perpetuity at the option of the lessee, is an actual consolidation of the properties of the Chicago Junction, owned and leased, and the owned properties of the Chicago River & Indiana Railroad Company, as well as the trackage rights of that company. When paragraph (6) states that it shall be lawful for two or more carriers to consolidate their properties under certain named conditions, it is in effect a statement by Congress that unless the conditions are complied with the consolidation is unlawful. Inasmuch as the Commission has not published its complete plan of consolidation, mentioned in paragraph (5), it is plain that consolidation cannot be made under paragraph (6), and that the order of the Commission cannot be sustained under said paragraph; therefore the approval of the Commission is void.

10. The Order Is Void Insofar As It Permits the River Road to Lease the Properties of the Junction, Because Neither the River Road Nor the Junction Road Made Any Application to the Commission for the Authorization Contained in the Order.

We have already seen that the only application filed with the Commission was that of the Central. The applicable provision of the statute in this respect is Paragraph (2) of Section 5:

> "Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease, etc."

The statute deals with acquisition. The application to acquire must be made by the carrier which proposes to acquire and probably by the carrier, which is to be acquired. At the time of the filing of the application, of the hearing before the Commission, and at the time the Commission announced its decision, the New York Central had absolutely no interest, legal or equitable, in the Chicago River & Indiana Railroad Company. It was at most a prospective stockholder. No authority could be exercised by the New York Central as a prospective stockholder. This point was urged before the Commission, but at no time did the Chicago River & Indiana Railroad Company make an application to the Commission. It is true it was represented at the hearing, but such representation in no way constituted the application referred to in the statute. The statute clearly gives no authority to the Commission to permit one carrier to lease the property of another upon the application of a third.

In the case of *Hanlon* v. *Eshelman*, 169 Calif. 200; 146 Pac. 656; P. U. R. 1915-B, 842, we have a case in point. In that case the prohibition in the statute was against the sale (not the acquisition) of carrier property. In that case the principle was laid down that an application to sell must be made by the owner, the one who sells. We have abundant confirmation of the point we here make, that when the statute prohibits acquisition except with the approval of the Commission, the one who proposes to acquire must make application.

Section 51-A of the Public Utilities Act of California provided that:

> "No railroad corporation * * * or water corporation shall henceforth sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, or system, necessary or useful in the performance of its duties to the public * * * without having first secured from the Commission an order authorizing it so to do."

One Durfy owned a water system in the vicinity of Sherman, California. He contracted to sell it to one Hanlon. Hanlon filed a petition with the Public Utilities Commission of California, praying for an order authorizing the sale of the water system by Durfy and its purchase by him.

Before the Commission disposed of the proceeding Durfy filed a petition setting up his contract with Hanlon and also setting up that the City of Los Angeles desired to purchase his water works and alleging that it would be in the public interest if the sale to the city were authorized, and that the applicant would sell to Hanlon pursuant to his contract if the Commission should determine that it was in the public interest.

Later Durfy filed another petition alleging that he had executed a deed conveying a portion of his property to

Los Angeles and praying for an order approving said conveyance. The Commission dismissed the Hanlon application and authorized the conveyance to Los Angeles by Durfy.

Hanlon then sought a writ of mandamus to compel the Railroad Commission to authorize the sale by Durfy to himself. The court held that the Commission was without power to pass upon the Hanlon application since its power was only to approve applications made by the owner, the Commission having nothing to do with the rights of the purchaser. At page 844 of P. U. R. 1915-B, the court said:

> "The theory upon which the Commission declined to act in proceeding No. 941, by either granting or refusing permission to carry out the Hanlon contract, was that the action of the Commission, under Section 51a, is merely permissive, and that 'the application should be made by the owner of the public utility property, because the authority must run to such owner.' This view, we think, is the correct one. The Commission's power is to be exercised for the protection of the rights of the public interested in the service, and to that end alone. The sales, leases, or encumbrances affected by Section 51a are dispositions of property of a public utility 'necessary or useful in the performance of its duties to the public.' The owner may not transfer such properties unless authorized by the Commission. All that the Commission is concerned with, therefore, is whether a proposed transfer will be injurious to the rights of the public. If not, the owner may be authorized to make the transfer. With the rights of an intending purchaser the Commission has nothing to do."

Of course, the Central was a proper party to make the application for acquisition of control of the River Road by purchase of its stock. What we are here complaining of is the fact that application for authority to the River Road to acquire control of the Junction under a lease

was not made by either the Junction or the River Road. The Commission was without authority to make the order. This point was brought to the attention of the Commission at every stage of this case.

11. The Order of the Commission Is Not a Specific Finding that the Acquisition by the Central of the River Road and Junction Road Will Be in the Public Interest.

The Commission may authorize the acquisition by one carrier of the control of another, only when the Commission "is of opinion" that such acquisition of control "will be in the public interest." No one will question that the opinion of the Commission must be formed upon evidence of record in the proceeding before it, applying to the consideration of such evidence the experience and expert knowledge of the Commission as a trained tribunal. But we insist that whether or not the acquisition of control is in the public interest depends upon the control which will be exercised under the Commission's decision. The finding of the Commission must be specific. The control authorized is the only matter which the Commission can consider. It is not sufficient to say that if the control which is authorized be exercised subject to seventeen conditions the acquisition of control will be in the public interest. The language of the statute authorizes "acquisition to the extent indicated by the Commission." There is no limitation of the acquisition by the Commission in the present case, other than that the acquisition is in one case by the purchase of capital stock and in the other case by a lease for 99 years, renewable in perpetuity at the option of the lessee. Having thus defined the extent of the acquisition which it proposes to authorize, the Commission must then ask itself, and answer the question from the record, "will such acquisi-

tion 'be in the public interest'?" That question must be answered yes or no; it cannot be answered "yes, *if seventeen conditions are complied with.*" We submit that the finding made by the Commission does not comply with the statutory requirements.

As indicating that the Commission recognized it was dealing with a matter fraught with possible danger to the public interest, we call attention to the following excerpts from the opinion of the Commission:

> "There are grave objections to an unconditional approval of the plan under consideration." (Rec., 21.)
>
> "But we are not prepared, in any event, to authorize the consummation of the plan without making assurance doubly sure by the imposition of certain conditions." (Rec., 22.)

12. The Order of the Commission Is Void Because It Does Not Specify the Date Upon Which the Same Shall Become Effective.

Paragraph (2) of Section 15 of the Interstate Commerce Act, provides:

> "Except as otherwise provided in this act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, etc."

By reference to the terms of the order, set forth on pages 54 and 55 of the bill (Rec., 33), it will be observed that there is nowhere contained any specified period of time at the expiration of which, or any specific date upon which the order shall become effective. This failure to comply with the statute invalidates the order.

13. The Order Is Void Insofar As It Approves and Authorizes the Leasing of the Junction Properties, Owned and Leased, to the River Road, Because No Lease Executed By the Parties Has Been Submitted To and Been Approved By the Commission.

It has been the uniform practice, with the sole exception of Finance Docket 1165, to require the applicant to submit an executed lease to the Commission for approval by the Commission. This lease has not been filed with the Commission as required by law. Paragraph 2 of Section 5 is not complied with by the Commission's simple authorization to the parties to execute a lease without definite submission of its terms to the Commission.

In this connection, we refer to the opinion of the Commission in the *Central Pacific-Southern Pacific* case, *supra*, wherein the Commission said (page 510):

> "In this proceeding the Southern Pacific Company applies for authority under paragraph (2) of Section 5 of the Interstate Commerce Act to acquire control by lease and stock ownership of the Central Pacific Railway Company, *a copy of the proposed lease being filed with the application.*"

There the Commission gave consideration to authorizing the acquisition of control under the forms and provisions of the lease submitted with the application. In that way only can the Commission determine whether an acquisition by lease will be in the public interest. It is obvious that the terms of such a lease are of great importance and that whether or not such a lease will be in the public interest depends upon the provisions contained in the lease.

In this case the Commission attached to its order seventeen conditions; whether these conditions are made part of the lease is an important matter. Moreover, the provisions as to maintenance of the property and the

manner in which it is to be operated are likewise of great importance to the public. The practice which the Commission has followed in all other cases should have been followed in the instant case, and the lease *in haec verbis* should have been submitted to the parties and to the Commission before final approval was given by the Commission to the acquisition of control by the River Road of the properties of the Junction.

Failure to have the lease before it in executed form before it authorized the acquisition of control under the lease renders the order void. Moreover, under paragraph (5) of Section 6 of the Interstate Commerce Act, it is provided that "every common carrier subject to this act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party." Under paragraph 15 of Section X of the bill of complaint (Rec., 9-10) it is alleged that no lease of the railroad properties of the Junction to the River Road executed by the parties thereto has been submitted to or been approved by the Commission. On the motions to dismiss this allegation stands admitted.

CONCLUSION.

The various questions which are involved in the decision of this case are of great public importance. In the Transportation Act, 1920, Congress adopted a new policy of regulation of the common carriers of this country. The provisions of that act contained in Paragraphs (18) to (20) of Section 1 and in Section 5, are part of a well rounded plan of regulation, and should be so interpreted as to carry out the evident purpose of Congress. The order of the Commission complained of herein is at complete variance, as we see it, with this purpose of Congress.

For the reasons herein stated the decree of the District Court denying the application for temporary injunction and dismissing the bill should be reversed and the case remanded with directions to grant the prayer for relief contained in the bill.

Respectfully submitted,

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2003 Chicago Temple Bldg.,
Chicago, Illinois.

January 2, 1924.

Office Supreme Court, U.
FILED
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WM. R. STANSBU
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IN THE

Supreme Court of the United States

OCTOBER TERM

NO. 489

The Baltimore & Ohio Railroad Company, Chicago, Indianapolis & Louisville Railway Company, Chicago & Erie Railroad Company, Grand Trunk Western Railway Company, The Pennsylvania Railroad Company and The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company,
Appellants,

vs.

United States of America, The New York Central Railroad Company, The Chicago River and Indiana Railroad Company, The Chicago Junction Railway Company, The Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald,
Appellees.

Appeal from the District Court of the United States, for the Northern District of Illinois, Eastern Division.

BRIEF AND ARGUMENT ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY AND THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY.

ROBERT J. CARY,
Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM.

THE BALTIMORE & OHIO RAILROAD COMPANY, CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, CHICAGO & ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY AND THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, THE NEW YORK CENTRAL RAILROAD COMPANY, THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, THE CHICAGO JUNCTION RAILWAY COMPANY, THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY AND RICHARD FITZGERALD,

Appellees.

No. 489

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF AND ARGUMENT ON BEHALF OF THE NEW YORK CENTRAL RAILROAD COMPANY AND THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY.

Statement.

The statement of the case appearing in the brief for Appellants summarizes the proceedings had before

the Interstate Commerce Commission and in the Court below but fails to present in proper light the fundamental questions involved in the case. It is believed that one of the best arguments in answer to the brief for the Appellants will be to state the allegations of their bill and the questions presented by it in their true significance. For this purpose a re-statement is offered of the issue involved, of the procedure had in the Court below, and of the allegations of the bill.

For convenience the Appellants and Appellees will be called respectively, plaintiffs and defendants.

The Issue:

The bill of complaint filed in the above entitled cause, is averred to be brought pursuant to the provisions of C. 32 of the Urgent Deficiency Appropriations Act, approved October 22nd, 1913, (38 Stat. L., 219, 220), and seeks to set aside and annul a permissive order of the Interstate Commerce Commission (71 I. C. C. 631) entered May 16th, 1922, under paragraph (2) of Section 5 of the Interstate Commerce Act as amended, authorizing:

> (a) The New York Central Railroad Company to acquire control of the Chicago River and Indiana Railroad Company, a terminal switching property located in Chicago, by the purchase of all of its capital stock at a price not exceeding $750,000., and
>
> (b) The Chicago River and Indiana Railroad Company to acquire control of a second terminal switching railroad connecting with it, viz: the Chicago Junction Railway, by a ninety-nine year lease,

renewable in perpetuity at the option of the lessee.

The bill seeks also to set aside the transactions consummated upon the authority of the order almost a year before the bill was filed, viz: the purchase of the stock and the making of the lease.

For this purpose the parties to these transactions are made defendants with the United States.

The only contact stated to exist between the plaintiffs and the order of the Commission, as well as the transactions consummated upon its authority, is to be found in their allegation (amended Paragraph XII of the bill, Record, 53) that they are competitors of The New York Central Railroad Company in the Chicago territory and that the acquisition by it of control of the terminal properties referred to has given it the opportunity to develop *legitimately* (there is no charge in this respect of any unlawful act) competitive traffic in its own interest to the consequent loss of the same to the plaintiffs.

The chief ground, among other minor ones, of alleged invalidity in the order is that until the Commission, under the provisions of paragraphs (4) and (5) of Section 5 of the Interstate Commerce Act as amended shall adopt a final plan for consolidating the railway properties of the United States into a limited number of systems it has no power under paragraph (2) of the same section of the act to authorize one carrier to acquire control of another either by the purchase of its shares of stock or by the taking of a lease of its properties for the term authorized by the Commission (Record 7-8).

Paragraph (2) of Section 5 of the Interstate Commerce Act as amended by the Transportation Act, 1920, reads:

> "(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

The Procedure in the Court Below.

The case was heard below before a court comprised pursuant to statute of a Circuit Judge and two District Judges upon motion of the plaintiffs for an interlocutory injunction and upon the several motions of the defendants to dismiss the bill. The motions of the respective parties were argued together. After hearing, the motion for an interlocutory injunction was denied (Record 143-144).

Thereupon the plaintiffs moved the court for leave to amend their bill instanter, which motion was granted. As

originally drawn the bill averred in substance, in paragraph XII that the acquisition of control approved and authorized by the Commission *will* result in diverting a large portion of competitive tonnage from the rails of the plaintiffs to the rails of the Central, or other routes in the New York Central System, and that such diversion, with consequent loss of revenue to the plaintiffs, *will* constitute irreparable loss and injury alleged to amount to a loss in net earnings of Ten Million Dollars per annum (Record 10).

The amendment made to the bill substituted a new first paragraph to paragraph XII averring in substance that the control of a belt line by a line-haul carrier gives such carrier a substantial advantage in securing competitive tonnage to the consequent disadvantage of competing line-haul carriers and describing how such advantage arises; that the New York Central control of the Junction properties authorized by the Commission has curtailed and will curtail the ability of the plaintiffs to secure competitive traffic of shippers located on the Junction properties; that the diversion of the competitive tonnage from the rails of the plaintiffs to the rails of the Central has resulted in a large loss of traffic and revenue to the plaintiffs amounting to Ten Million Dollars; and that the loss in net earnings to the plaintiffs from the continued control acquired under the order of the Commission will approximate Ten Million Dollars per annum (Record 53).

No charge is made that the Central has violated in the operation of the Junction properties any provision of the Interstate Commerce Act or has in any other respect

acted unlawfully as against the plaintiffs in promoting the movement of competitive traffic over its own lines.

All of the motions originally made were renewed with respect to the amended bill and, after further hearing upon the same, the court denied the plaintiffs' motion for an interlocutory injunction and granted the several motions of the defendants to dismiss the bill as amended, whereupon a decree was entered accordingly and the plaintiffs appealed therefrom to this court (Record 144).

Allegations of the Bill.

The facts disclosed on the face of the bill and its exhibits pertinent to the issues to be argued and their general significance may be summarized as follows (Record 1):

On December 28th, 1920, The New York Central Railroad Company filed its application with the Interstate Commerce Commission pursuant to the provisions of paragraphs (18) to (20), inclusive, of Section 1, and paragraph (2) of Section 5, of the Interstate Commerce Act, for authority and for a certificate of public convenience and necessity permitting the New York Central to enter into an agreement with The Chicago Junction Railways and Union Stock Yards Company providing for the acquisition by The New York Central Railroad Company of all of the capital stock of The Chicago River and Indiana Railroad Company, and for the leasing to such latter company for a term of ninety-nine (99) years and thereafter at the election of the lessee in perpetuity of the railroad properties (owned and leased) of The Chicago Junction Railway Company.

At the first hearing of the proceeding, held by the Commission at Chicago on April 5th, 1921, the plaintiffs in the bill in equity appeared and filed an intervening petition in opposition to the prayer of the application, which petition was received and the plaintiffs were made parties to the proceeding (Record 6).

After extensive public hearings, held at Chicago and Washington, the Commission, on May 16th, 1922, made its report (a copy of which is attached as an exhibit to the bill) (Record 15) summarizing the contentions of the respective parties; reviewing the record, which it stated was voluminous; finding the ultimate facts based upon the record; and finding, subject to the observance of certain specified conditions, that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction would be in the public interest. Pursuant to such finding, the Commission, on the same day, entered its order (a copy of which is also attached to the bill as an exhibit) (Record 33) providing:

> "That the acquisition by The New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock at a price not exceeding the sum of $750,000, be, and the same is hereby, approved and authorized."

and further providing:

> "That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized."

The plaintiffs allege, upon information and belief, that immediately upon the publication of the decision, report and order of the Commission, and prior to July 13th, 1922, the Central acquired control of the River Road by the purchase of the capital stock thereof; that the River Road acquired control of the Junction properties (owned and leased) by lease for the period of ninety-nine (99) years, renewable, at the option of the lessee, in perpetuity; and that the Central and River Roads have continually operated the said properties as an integral part of, and for the benefit of, the New York Central System of railroads (Record 10).

Almost a year after the consummation of the transactions thus authorized the plaintiff railroad companies filed their bill, as above stated, seeking to annul the order of the Commission and to set aside the transactions referred to.

The bill prays not only for a preliminary and a final injunction in respect of the subject matters above referred to, but also seeks a discovery of the relations existing between the defendant railroad companies, and, in furtherance thereof, asks that such defendants be required to answer a series of interrogatories contained in the bill (Record 11-14).

The jurisdiction for the bill is based by averment upon the provisions of the Urgent Deficiency Appropriations Act (Record 3), presumably upon the theory that the order of May 16th, 1922 of the Interstate Commerce Commission invades certain rights of the plaintiffs as parties in interest within the meaning of the language of that Statute. However, a survey of the bill, as a whole, makes it self-evident that it is brought for discovery and

injunctive relief against the defendants other than the United States with the object of setting aside the transactions mentioned and terminating the control of the Junction properties acquired by The New York Central Railroad Company.

The amended first paragraph of paragraph XII of the bill contains the only averments attempting to show contact between the order of the Commission, the transactions consummated pursuant to its authority, and the interests of the plaintiffs. It is the sole basis upon which they justify their right to proceed in equity to annul the order of the Commission and to set aside the transactions consummated pursuant to such order by the defendant railroad companies. It reads:

> "Plaintiffs further show that the River Road and the Junction, on May 15, 1922, were, and prior to that date always had been, neutral belt railroads uncontrolled by any trunk line carrier and as such were used by all railroads, entering Chicago, impartially and without discrimination; that prior to May 16, 1922, the plaintiffs herein competed for traffic originating at points of origin on, or destined to points of delivery on, the said River Road and the Junction on equal terms with the Central without either the plaintiffs or the Central having any advantage in the securing of said traffic by reason of having an ownership or control of the said River Road and/or the said Junction; that the acquisition of control approved and authorized by the Commission in its order of May 16, 1922, substitutes monopoly of control and operation for the neutral control and operation of the Junction and River Roads which prior to May 16, 1922, served alike all railroads reaching Chicago, including the

plaintiffs herein and the Central; that practically all of the tonnage originating at or destined to points on the Junction and the River Roads is competitive tonnage in that the same could be hauled either over the lines of railroad constituent parts of the New York Central System or over the lines of one or more of your plaintiffs; that the control of a belt line by one line-haul carrier gives that line-haul carrier substantial advantages in the securing of competitive tonnage to the consequent disadvantage of competing line-haul carriers not having such control; that in cases where the shippers on the River Road and the Junction have failed to direct the route of movement of their shipments consigned to points which are served by the Central or by lines of railroad constituent parts of the New York Central System, directly or through its or their connections, as well as by the plaintiffs herein, directly or by their connections, it is and since May 16, 1922 has been the practice of the officials, agents and employes of the River Road and Junction to route said shipments via the line of the Central and via the lines of carriers constituent parts of the New York Central System to the exclusion of routing any of said shipments via the lines of the plaintiffs herein; that the acquisition of control approved and authorized by the Commission in its said order has curtailed, and so long as it continues to exist, will, greatly curtail the ability of the plaintiffs to secure the competitive traffic of shippers located upon the lines of the Junction and the River Road for the reason that subsequent to May 16, 1922, it has been, now is, and will be, the practice of shippers located on the said railroads to give preference to cars of the Central (which, under the order complained of, has the control of the said Roads),

to the exclusion of cars of the plaintiffs, its competitors, and to route their shipments via the line of the Central and via the lines of railroad constituent parts of the New York Central System in lieu of routing said shipments via the lines of the plaintiffs herein; that the diversion of tonnage from the rails of the plaintiffs to the rails of the Central or other routes of the New York Central System, consequent upon the facts above related has resulted in a large loss of traffic and of revenue to the plaintiffs, to their irreparable loss and injury, in an amount exceeding $10,000,000.00; and that the loss in net earnings to plaintiffs which will result from the continued control acquired under the said order of the Commission will approximate $10,000,000.00 per annum so long as said control continues." (Record 53.)

It is to be noted that the foregoing allegations make no charge of any illegal discrimination or other unlawful act in the operation of the Junction properties under their new control as against the railroads of the plaintiffs, or that new operating practices or tariff provisions have been installed that now prevent them from serving all their connections with the same equality as theretofore.

The gravamen of the complaint is rather based upon an abstract proposition viz: "that the control of a belt line by one line-haul carrier gives that line-haul carrier substantial advantages in the securing of competitive tonnage to the consequent disadvantage of competing line-haul carriers not having such control"; that in the present case such advantage is evidenced by the fact that since May 16, 1922 it is the practice of the Junction officials to route unrouted shipments over the New York

Central and of shippers to give preference to the cars of the Central and to route their shipments via its lines in lieu of routing them via the lines of the plaintiffs.

The plaintiffs do not say that they have not now the same opportunity as existed prior to New York Central control to solicit business from shippers located on Junction rails and to cause it to move over their respective lines. They complain only that they have suffered loss of tonnage in a fair field of competition to a competitor because of an alleged tendency of the shipping public arising out of the control by such competitor of the Junction properties to voluntarily prefer its lines to those of their own.

Upon such a basis they have brought in a court of equity what is, in effect, a quo warranto proceeding to test the validity of the license granted by the Commission to the New York Central to acquire control of the Junction properties, for they aver that their bill of complaint is brought pursuant to the provisions of Chapter 32 of the Urgent Deficiency Appropriations Act to annul an order of the Commission, and they impliedly concede that if such license be valid they have suffered in the premises no injury of which they can complain, since all relief asked for is premised alone upon its alleged invalidity. Clearly they cannot be heard in any such capacity.

It would thus appear that the plaintiffs' own statement of their case should be one of the chief refutations of their right to proceed.

The plaintiffs assign certain reasons why the order of the Commission should be set aside and the transactions

consummated pursuant to the same should be declared void and enjoined. They are, in substance, as follows:

(1) The Commission was without authority either in law or in fact to make the said order (Record 6).

(2) The Commission issued no certificate of public convenience and necessity in favor of the transactions authorized by it (Record 6).

(3, 4 and 5) The record made before the Commission, upon which its order is based, contains no evidence that the present or future public convenience and necessity require or will require the consummation of the transactions proposed, but contains evidence that such consummation will be contrary to the present or future public convenience and necessity (Record 6-7). (The point here made is presumably based upon the assumption that the order of the Commission may have been entered pursuant to power given it under paragraphs (18) to (20) inclusive of Section 1 of the Interstate Commerce Act, which provides that the Commission shall evidence its action in the form of a certificate that the present or future public convenience and necessity require or will require the consummation of the transaction proposed by the applicant.)

(6 and 7) The record made before the Commission, upon which the said order is based, contains no evidence that the acquisition by the Central of control of the River Road by the purchase of the capital stock of the River Road or the acquisition by the River Road of the control of the properties of the Junction under a lease will be in the public interest; but on the contrary, the said record contains evidence which clearly shows that the said ac-

quisition of control will be directly contrary to the public interest and to a sound public policy (Record 7). (The point here made is based upon the assumption that the order of the Commission was entered pursuant to power given it under paragraph (2) of Section 5 of the Interstate Commerce Act.)

The finding of the Commission contained in its report follows the requirements of said paragraph. It reads:

> "Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest."

The formal order of the Commission based upon its report, and heretofore quoted, likewise complies with the requirements of said paragraph, for it orders:

> "That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital stock * * * be, and the same is hereby, approved and authorized."

and

> "That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized."

(8, 9 and 10) The Commission, by paragraph (2) of Section 5 of the Interstate Commerce Act, is authorized to approve the acquisition by one of such carriers of

control of another carrier, either under a lease or by the purchase of stock, only when such control does not involve the consolidation of such carriers into a single system for ownership and operation, and when such control will be in the public interest; acquisition by the Central of the control of the River Road by the purchase of the capital stock of said River Road and acquisition by the River Road of control of the Junction by lease of its properties, as set forth in the application of the Central to the Commission and authorized by the Commission, will constitute a consolidation of (1) the Central, (2) the River Road, and (3) the Junction, into a single system for ownership and operation, and, therefore, the Commission is without authority by order to approve and authorize such acquisition (Record 7-8). (The claim made under this point is based upon the contention, as further elaborated in the bill, that the Commission has not yet, as required by paragraphs (4) and (5) of Section 5 of the Interstate Commerce Act, adopted a plan for the consolidation of the railway properties of the continental United States into a limited number of systems, and that until such plan has been adopted the Commission has no power to authorize, under the provisions of paragraph (2) of Section 5 of the Act, one carrier to acquire control of another carrier by the purchase of all of its capital stock and thereupon to arrange that such controlled carrier shall take a lease for ninety-nine (99) years and thereafter, at the election of the lessee, in perpetuity of the railroad properties of a third carrier. It is claimed that the consummation in the instant case of control of such a character amounts to a consolidation of (1) the River Road and of (2) the Junction, and also of (1) the

Central, of (2) the River Road, and of (3) the Junction, within the meaning of paragraph (6) of Section 5 of the Interstate Commerce Act, making it lawful for two or more carriers by railroad subject to said Act, to consolidate their properties, or any part thereof, into one corporation for the ownership, management and operation of the properties theretofore in separate ownership, management and operation, under certain conditions, the first of which is that "The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission".)

(11) The order of the Commission is void because entered pursuant to the application of the Central alone, and, insofar as it purports to approve and to authorize the acquisition by the River Road of the control of the property of the Junction under a lease, it is unlawful and void, because no application was made to the Commission by either the River Road or the Junction seeking the approval and authorization of such acquisition (Record 9).

(12) Exception is taken to the fact, as being a want of compliance with paragraph (2) of Section 5, that the Commission prefaced its finding that the acquisition of control approved by it will be in the public interest with the words "Subject to the observance of the above conditions" being certain conditions enumerated in its report (Record 9).

(13) It is averred that the order is null and void because it did not prescribe the day upon which the same should take effect, being contrary to the requirement of paragraph (2) of Section 15 of the Interstate Com-

merce Act that "all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, etc." (Record 9).

(14) The order is unlawful and void insofar as it purports to approve and authorize the leasing of the properties (owned and leased) of the Junction to the River Road, in that no application has been made to the Commission by either the River Road or the Junction for a certificate that the present or future public convenience and necessity require, or will require, the acquisition and operation by the River Road of the properties operated by the Junction on May 16th, 1922 (Record 9). (The point here made is presumably based upon the assumption that the order of the Commission may have been entered pursuant to power given it under paragraphs (18) to (20) inclusive of Section 1 of the Interstate Commerce Act.)

(15) The order of the Commission insofar as it purports to approve and to authorize the leasing of the properties (owned and leased) of the Junction to the River Road is unlawful and void in that no lease of the railroad properties (owned and leased) of the Junction to the River Road executed by the parties thereto has been submitted to, or been approved by, the Commission (Record 9).

The bill of complaint with its attached exhibits, which are made a part of it as fully as if set forth in the bill, shows that the order of the Commission was permissive in character, sanctioning the exercise of a privilege

granted by Statute upon approval and authority of the Commission after hearing; that extensive public hearings were had at which the plaintiffs, as interveners, were present; that a voluminous record was taken upon all issues involved (Record 16); that in the Commission's report it summarized the several contentions of the respective parties and the evidence pertinent to the issues; that, upon the facts so reported, it held that pending final determination of future policies the greatest good can be obtained by the continuance, for the time being, of the competitive terminal situation; that this can best be accomplished by bringing the present neutral Junction properties into closer relation with a trunk line like the Central; that the Central's terminal facilities are relatively inadequate as compared with the competitor eastern trunk lines, but that the Central controls extensive facilities for classification and interchange which are complementary to the Junction properties; that the stronger competition and the connection between the Junction properties and the Harbor Belt facilities, which would thus be brought about, would not only insure to the shippers of the Junction the necessary expansion and elasticity of facilities, together with the assistance of an interested trunk line in times of car shortage, and other emergencies, but would also remove congestion from the closely hemmed-in district served by the Junction and thus open facilities for expedition in the handling of traffic in and out, and also for handling traffic from one part of the City to another; that it has been held that where such a transaction as the one proposed would clearly facilitate the movement of traffic through a highly congested district, the circumstances that other carriers would suffer a loss of revenue is not

controlling, citing (*People ex rel. New York Central R. R. Co.* v. *Public Service Commission,* 183 N. Y. S. 930); that there are in the record ample grounds for the belief that the Junction can no longer solve its problems without outside assistance; that on the other hand, it is believed that the benefits pointed out by the Central can be made to accrue to the public by the consummation of the proposed plan; that a prime factor in the situation is the circumstance that the general policy on all terminals in Chicago is that of equal opportunity afforded to all connecting carriers irrespective of the ownership or control of a given terminal property by a single trunk line, or by a group of trunk lines; that traffic is handled for all carriers in the same way and on the same terms, so that a shipper on terminals owned by a single carrier has the utmost freedom in routing via competing lines and apparently receives the same measure of service whether his shipment moves over the lines of the owning carrier or those of a competitor (Record 16-22).

The report then continues by saying:

> "Those shippers who appeared in opposition express the fear that they will not be accorded like treatment by the Central. The present management of the Central disclaimed any intention of making any changes in the method of handling competitive traffic or the general plan of operating the Junction properties, and those assurances may be taken at their face value, especially since the contrary policy would clearly be against the self-interest of the Central, in that it would thereby lose the good will of the shipper. There is of course, every indication that the Central will be able to build up its own line-haul traffic as the re-

> sult of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end." (Record 22.)

It thereupon specifies a series of conditions to be observed in the operation of the properties subject to its order of approval and concludes by finding that, subject to the observance of such conditions, the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest (Record 22-25).

It thus appears from the bill of complaint that the Commission gave due consideration, from the standpoint of the public interest, to the ground, and only ground upon which the plaintiffs seek to secure in their behalf the intervention of a court of equity, namely, that by virtue of the acquisition of control of the Junction properties by the New York Central a new competitive factor has been interjected into a situation whereby they allege that they have been and will be subjected to a loss of competitive tonnage.

No claim is made that the order of the Commission was addressed to the plaintiffs or attempted to regulate their affairs in any respect; no charge is made that their property will be taken without due process of law or that they will be deprived of the equal protection of the law; no charge is asserted that the acquisition of control by the Central of the Junction properties will be used unfairly or contrary to law. Its existence as a fact is the sole thing complained of and the only premise upon which is based every prayer for equitable relief.

POINTS AND AUTHORITIES

I.

The Plaintiffs have misconceived the application of the provisions of the Urgent Deficiency Appropriations Act. It created no statutory right of review, either as to parties or issues, of the Commission's orders. Except as it restores to the Distict Courts certain equity jurisdiction it is solely a statute of procedure. The order of May 16th, 1922 was a legislative act in the form of a sanction to exercise a privilege granted pursuant to statute. The Plaintiffs are not subject to, or affected by its terms and cannot complain of its alleged invalidity.

Borgnis v. *Falk Co.*, 147 Wis. 327; 133 N. W. 209.
Prentis v. *Atlantic Coast Line Company*, 211 U. S. 210, 226.

1. THE TRANSFER OF THE EXCLUSIVE JURISDICTION OF THE COMMERCE COURT TO THE DISTRICT COURTS HAD THE EFFECT ONLY OF RESTORING TO SUCH COURTS, AS SUCCESSORS TO THE CIRCUIT COURTS, THE ORIGINAL POWERS AT LAW AND EQUITY OF THE CIRCUIT COURTS.

Urgent Deficiency Appropriations Act, October 22, 1913, 38 Stat. L. 219, 220.
The Commerce Court Act, 36 State. L. 539.
Peavey & Company v. *Union Pacific R. Co.*, 176 Fed. Rep. 409.
Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42.

2. THE ORDER OF MAY 16TH, 1922, OF THE INTERSTATE COMMERCE COMMISSION, BEING A PERMISSIVE ONE OF AUTHORITY AND APPROVAL, IT IS FROM ITS NATURE INCAPABLE OF BEING ENFORCED, AND IS THEREFORE NOT AN ORDER SUBJECT TO ANNULMENT BY A COURT OF EQUITY.

Procter & Gamble v. *United States*, 225 U. S. 282.

3. THE ORDER OF MAY 16, 1922, DID NOT AFFECT THE RIGHTS OR INTERESTS OF THE PLAINTIFFS IN ANY RESPECT.

United States v. *B. & O. R. R. Company*, 225 U. S. 306.

I. C. C. v. *Union Pacific*, 222 U. S. 541.

I. C. C. v. *Illinois Central*, 215 U. S. 452.

Reagan v. *Farmers' Loan & Trust Company*, 154 U. S. 362.

Borgnis v. *Falk Co.*, 147 Wis. 327, 133 N. W. 209.

4. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST WITHIN THE MEANING OF THE PROVISOS CONTAINED IN SECTION 5 OF THE COMMERCE COURT ACT.

Commerce Court Act, Section 5.

Edward Hines, Yellow Pine Trustees, et al. v. *United States*, No. 91. (Decided by U. S. Supreme Court Nov. 12th, 1923.)

Peavey & Co. v. *Union Pacific R. Co.*, 176 Fed. Rep. 409.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42.

McLean Lumber Company v. *United States*, 237 Fed. Rep. 460.

Nashville Grain Exchange v. *United States* (*case 46*), 191 Federal Reporter 37.

Louisville & Nashville Railroad Company (*case 47*), 191 Federal Reporter 37.

Atlantic Coast Line R. Co. v. *Interstate Commerce Commission*, 194 Federal Reporter 449.

Merchants' & Manufacturers' Traffic Association v. *United States*, 231 Fed. Rep. 292.

United States v. *Merchants' etc. Association*, 242 U. S. 178.

City of New York v. *United States*, 272 Fed. Rep. 768.

Village of Hubbard, Ohio v. *United States*, 278 Fed. Rep. 754.

State of Tennessee v. *United States*, 284 Fed. Rep. 371.

North Dakota v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485.

Oklahoma v. *A., T. & Santa Fe Ry.*, 220 U. S. 277.

North Dakota v. *Chicago & N. W. Ry. Co.*, 257 U. S., 485.

McLean Lumber Company v. *United States*, 237 Fed. Rep. 460.

5. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST UNDER THE PROVISIONS OF THE INTERSTATE COMMERCE ACT.

United States et al. v. *Illinois Central R.R. Co. et al.*, Nos. 40 and 38. (Decided by the Supreme Court of the United States, January 7th, 1924.)

6. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST AS DEFINED BY PRINCIPLES OF EQUITY.

Railroad Company v. *Ellerman*, 105 U. S. 166.

Geneva-Seneca Electric Co. v. *Economic Power & Construction Co. and City of Geneva*, 136 App. Div. (N. Y.) 219.

The Christopher & Tenth St. Ry. Co. v. *The Central Crosstown R. R. Co.*, 67 Barb. (N. Y.) 315.

New England R. Co. v. *Central Ry. & Elec. Co. et al.*, 36 Atl. 1061.

L. R. A. 1916 B, page 1087.

Baxter Tel. Co. v. *Cherokee Co. Mut Tel. Assn. et al.*, 94 Kan. 159, 146 Pac. 324.

Coffeyville Mining & Gas Co. v. *Citizens' Natural Gas & Mining Co.*, 55 Kan. 173-179, 40 Pac. 326.

Burns v. *St. Paul City Ry. Co.*, 101 Minn. 363, 112 N. W. 412.

Camblos v. *Phila. &c. R. Co.*, Federal Case No. 2331.

The Golconda Nor. Ry. v. *The Gulf Lines C. R. R. of Ill.*, 265 Ill. 194.

New Hartford Water Co. v. *Village Water Co.*, 87 Atl. 358.

Home Tel. Co. of Grass Lake v. *Michigan R. R. Comm.*, 140 N. W. 496.

II.

The provisions of the Commerce Court Act as applied to the district courts could not constitutionally authorize such courts to review orders of the Interstate Commerce Commission except as may be so required to pronounce judgment in cases and controversies as provided in the Constitution.

Muskrat v. *United States*, 219 U. S. 346.

Marbury v. *Madison*, 1 Cranch. 137.

Cohens v. *Virginia*, 6 Wheat. 264.

Chicago & Grand Trunk Railway Company v. *Wellman*, 143 U. S. 339.

Keller, et al., v. *Potomac Electric Power Company et al.*, 261 U. S. 428.

III.

The allegation of the bill that the record made before the Commission upon which the said order is based contains no evidence that the present or future public convenience and necessity require or will require the consummation of the transactions authorized or that they will be in the public interest, are not sufficient to show that the Commission was without power to enter said order, or that it was otherwise invalid.

Interstate Commerce Act, Paragraph (2) of Section 5.
Interstate Commerce Commission v. *L. & N. Railroad*, 227 U. S. 88.
United States v. *Merchants and Manufacturers Traffic Association*, 242 U. S. 178.
Merchants & Manufacturers Traffic Association v. *United States*, 231 Fed. Rep. 292.

IV.

The order of the Commission being a legislative act, permissive in character, its validity cannot be attacked upon the ground that it is not supported by evidence.

United States v. *Merchants and Manufacturers Traffic Association*, 242 U. S. 178.
I. C. C. v. *L. & N. R. R.*, 227 U. S. 88.
Interstate Commerce Act, Section 20a.
Miller v. *United States*, 277 Fed. Rep. 98.

V.

The purchase by The New York Central Railroad Company of all of the capital stock of The Chicago River and Indiana Railroad Company and the leasing to such latter company of the railroad of The Chicago Junction Railway Company did not bring about a consolidation of either The New York Central Railroad Company and The Chicago River and Indiana Railroad Company, or of The Chicago River and Indiana Railroad Company and The Chicago Junction Railway Company, or of all three such railroad companies into a single system for ownership and operation. The Interstate Commerce Commission therefore had power under the provisions of paragraph (2) of Section 5 of the Interstate Commerce Act to approve and authorize the acquisition of control by The New York Central Railroad Company of said other railroads by the means thus described.

1. Interpretation of paragraph (2) of Section 5.

2. Interpretation of the Term Consolidation as used in Paragraphs (4), (5), (6) and (7) of Section 5.

Interstate Commerce Act, Paragraphs (4), (5), (6) and (7) of Section 5.

Thompson on Corporations, Second Edition, Volume 5, Sections 6035, 6036, 6037, 6040.

14-A *Corpus Juris*, 1054.

Fletcher, Cyclopedia Corporations, Vol. 7, Sec. 4661.

Louisville, &c. Railroad Co. v. *Louisville Trust Co.*, 174 U. S. 552.

Mills v. *Central Railroad Company*, 2 Atl. (N. J.) 453.

Archer v. *Terre Haute, etc. R. Co.*, 102 Ill. 493.

State v. *Montana Ry.*, 45 L. R. A. 271; 53 Pac. 623.

Gere v. *New York Central & Hudson River Railroad Company*, 19 Abb. N. C. 193.

3. Inconsistencies between Paragraph (2) of Section 5 and the remaining Paragraphs of the Section arising from interpretation given to Paragraph (2) by Counsel for the Plaintiffs.

United States v. *Southern Pacific Co., et al.*, 290 Federal Reporter 443; 259 U. S. 214.

La Roque v. *United States*, 239 U. S. 64.

Rose's Notes (*United States* v. *Moore*, 95 U. S. 760).

Lease of Valley Terminal Railway Co., Finance Docket No. 1, 65 I. C. C. 105.

Control of Big Four by New York Central, Finance Docket No. 2046, 72 I. C. C., 96, 98.

Valley Terminal Railway Company, 65 I. C. C., 105, 76 I. C. C., 147.

Chicago, Terre Haute & S. E. R. R. Co., 70 I. C. C., 20.

New York, Philadelphia & Norfolk R. R. Co., 70 I. C. C., 299.

Cumberland Valley & Martinsburg R. R., 70 I. C. C., 301.

Perth Amboy & Woodridge R. R. Co., 70 I. C. C., 303.

New York Bay Railroad Company, 70 I. C. C., 306.

California Southern R. R. Co., 70 I. C. C., 514.
Chesapeake & Ohio Railway Co. of Indiana, 70 I. C. C., 694.
Arizona & New Mexico Ry. Co., 70 I. C. C., 795.
Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co. (Panhandle), 72 I. C. C., 128.
Eldorado & Santa Fe Ry. Co., 72 I. C. C., 229.
Toledo & Ohio Central Ry. Co.
Kanawha & West Virginia R. R. Co.
Zanesville & Western Ry. Co.
} 72 I. C. C., 243.
Grand Rapids & Indiana Ry. Co., 72 I. C. C., 260.
Virginian & Western Ry. Co., 72 I. C. C., 454.
Wheeling Terminal Ry. Co. and others, 72 I. C. C., 674.
Chicago, Memphis & Gulf Ry. Co., 76 I. C. C., 637.
Chicago, St. Louis & New Orleans Ry., 76 I. C. C., 294.
New York, Lake Erie & Western C. & R. R. Co., 71 I. C. C., 541.
Rio Grande, El Paso & Santa Fe R. R., Finance Docket 2804, decided April 4, 1923.
Control of Black Mountain R. R., Finance Docket 2852, decided May 5, 1923.
Control of Dodge City & Cimarron Valley Ry., Finance Docket 2870, decided May 16, 1923.
Evansville, Indianapolis & Terre Haute Ry. Co., 67 I. C. C., 513.
Pittsburgh, Fort Wayne & Chicago Ry. Co., 67 I. C. C., 752.
Control of Lake Erie & Western by Nickel Plate, 72 I. C. C., 459.

VI.

The Plaintiffs' right to equitable relief is barred because of their laches shown on the face of their bill.

Commonwealth v. *Phila., B. & B. M. Tpk. Co.*, 153 Pennsylvania 47 (25 Atl. Rep. 1105).
State v. *Janesville Water Power Co.*, 92 Wisconsin 496 (66 N. W. 512).
United States v. *Willamette V. & C. M. W. R. Co.*, 54 Fed. Rep. 807.
People v. *Pullman Palace Car Co.*, 175 Illinois 125.
Sullivan v. *Portland etc. R. R. Co.*, 94 U. S. 806.
Galliher v. *Cadwell*, 145 U. S. 368.
New York City v. *Pine*, 185 U. S. 93.
Venner v. *Chicago City Railway Co.*, 236 Illinois 349.
Marks v. *Merrill Paper Co.*, 203 Fed. Rep. 16.
Wright v. *Tacoma Gas & Elec. Light Co.*, 101 Pacific 865.
Hill v. *Atlantic & N. C. R. R. Co.*, 145 N. C. 539 (55 S. E. 854).
U. S. Trust Co. v. *Chicago Terminal Transfer R. Co.*, 188 Fed. Rep. 292.

WHERE LACHES OF THE PLAINTIFFS IS SHOWN ON THE FACE OF THE BILL IT MAY BE TAKEN ADVANTAGE OF BY DEMURRER OR BY ITS EQUIVALENT, A MOTION TO DISMISS THE BILL.

Maxwell v. *Kennedy*, 8 Howard 210.
Speidel v. *Henrici*, 120 U. S. 377.
Venner v. *Chicago City Railway Co.*, 236 Illinois 349.

VII.

None of the objections made in the bill to the validity of the Commission's order based upon an alleged want of regularity in procedure is well taken. Such objections are all frivolous in character.

Interstate Commerce Act, Paragraph (19) of Section 1.

Interstate Commerce Act, Paragraph (2) of Section 5.

United States v. *Merchants' etc. Associations*, 242 U. S. 178.

BRIEF OF ARGUMENT.

I.

The Plaintiffs have misconceived the application of the provisions of the Urgent Deficiency Appropriations Act. It created no statutory right of review, either as to parties or issues, of the Commission's orders. Except as it restores to the District Courts certain equity jurisdiction it is solely a statute of procedure. The order of May 16th, 1922 was a legislative act in the form of a sanction to exercise a privilege granted pursuant to statute. The Plaintiffs are not subject to, or affected by its terms and cannot complain of its alleged invalidity.

There are certain underlying principles which should be noted in considering the issues involved in this case:

(a) The Interstate Commerce Commission is an arm of the legislative branch of the Government. An excellent statement of this universally recognized principle is found in the case of *Borgnis* v. *Falk Co.*, 147 Wis. 327; 133 N. W. 209. The court speaking of commissions created by the legislature there said at page 219 of 133 N. W.:

> "The legislative branch of the government by statute determines the rights, duties and liabilities of persons and corporations under certain conditions of fact, and varying as the facts and conditions change. Manifestly the legislature cannot remain in session and pass a new act upon every change of conditions; but it may and does commit to an administrative board the duty of ascertain-

> ing when the facts exist which call into activity certain provisions of the law, and when conditions have changed so as to call into activity other provisions. The law is made by the Legislature; the facts upon which its operation is dependent are ascertained by the administrative board."

(b) The order of the Commission in the present case was legislative in character because its effect was to apply prospectively a federal statute.

In *Prentis* vs. *Atlantic Coast Line Company*, 211 U. S. 210, 226, this court said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind".

(c) There is no statute vesting in the Federal Courts a right to review the proceedings or orders of the Interstate Commerce Commission.

(d) Legislation in this respect is limited to prescribing the occasions and procedure under which the Federal Courts may exercise the powers otherwise inhering in them as courts of law and equity to enforce or annul the orders of the Commission as an administrative body.

1. THE TRANSFER OF THE EXCLUSIVE JURISDICTION OF THE COMMERCE COURT TO THE DISTRICT COURTS HAD THE EFFECT ONLY OF RESTORING TO SUCH COURTS, AS SUCCESSORS TO THE CIRCUIT COURTS, THE ORIGINAL POWERS AT LAW AND EQUITY OF THE CIRCUIT COURTS.

The Urgent Deficiency Appropriations Act of October 22nd, 1913 (38 Stat. L., 219-220) abolished the Commerce Court from and after December 31st, 1913, and provided that "the jurisdiction vested in said Commerce Court by said Act [Commerce Court Act] is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed.".

The Urgent Deficiency Appropriations Act further provides that "The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court.".

Section One of the Commerce Court Act (36 Stat. L. 539) reads in part as follows:

> "Section 1. That a court of the United States is hereby created which shall be known as the Commerce Court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:
>
> First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce

Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

* * * * * * *

Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court."

Particular attention is called to the last paragraph above quoted.

Interpretative of the powers of the Federal Courts, as regulated by statute, over the orders of the Commission is the case of *Peavey & Company* v. *Union Pacific R. Co.*, 176 Fed. Rep. 409. In this case it is said:

> "A careful search of the interestate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the commission to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. 'The jurisdiction to hear and determine such suits' is vested in the Circuit Courts. Section 16, as amended (34 Stat. 592 (U. S. Comp. St. Supp. 1909, p. 1162)). The determination of the question what parties may maintain such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a federal court of equity for relief."

This case was appealed to this Court under the title of the *Interstate Commerce Commission* vs. *Diffenbaugh*, 222 U. S. 42. The Court said:

> "The jurisdiction in the Diffenbaugh case was doubted, although the Commission did not press the point as it wishes a final decision. We are content to leave that matter on the statement of the court below. 176 Fed. Rep. 416, 417. The plaintiffs are affected by the order and it is just that they should have a chance to be heard, although not parties before the Commission."

In creating the Commerce Court and transferring to it specified instances of jurisdiction of the Circuit Courts, Congress also provided that

> "The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes." (Sec. 1.)

Thus the effect of transferring by means of the Urgent Deficiency Appropriations Act the exclusive jurisdiction previously given to the Commerce Court to the District Courts has now resulted in delivering to the District Courts that jurisdiction formerly possessed by the Circuit Courts before the enactment of the Commerce Court Act, with the effect only that in the instance of the cases enumerated in the Commerce Court Act the procedure of the Commerce Court Act, to which the District Courts were made subject, is to be followed.

In the present situation then, we are, from the jurisdictional standpoint, as if Section One of the Commerce

Court Act had never been enacted and proceeding in the United States District Court under its ordinary equity powers.

The provisions of the Urgent Deficiency Appropriations Act neither added to nor took from such powers, but only prescribed the procedure under which they should be exercised on certain occasions.

It is true, therefore, that this proceeding is not in the nature of a statutory reviewing action either as to parties or issues to pass upon the legality of the order of May 16th, 1922, of the Interstate Commerce Commission, or of the validity of the transactions undertaken pursuant to authority thus given. The jurisdiction of the court over the controversies involved is to be decided by submitting such controversies to the application of the ordinary principles of equity jurisdiction, and as thus analyzed to determine whether as to parties or questions they present issues that a court of equity unaided by special statutory powers should consider, and if so, that Federal courts of equity have power to adjudicate.

2. THE ORDER OF MAY 16TH, 1922, OF THE INTERSTATE COMMERCE COMMISSION, BEING A PERMISSIVE ONE OF AUTHORITY AND APPROVAL, IT IS FROM ITS NATURE INCAPABLE OF BEING ENFORCED, AND IS THEREFORE NOT AN ORDER SUBJECT TO ANNULMENT BY A COURT OF EQUITY.

The District Courts having acquired, as successors of the Commerce Court, no special statutory jurisdiction, respecting orders of the Interstate Commerce Commission, it is appropriate to consider whether it is within

the jurisdiction of a Federal Court of Equity to inquire into the validity of an order of the Interstate Commerce Commission having no mandatory effect, and thus subjecting no one to the observance of its provisions.

This comes to the inquiry whether the judicial branch of the Government can interfere in the activities of the legislative or executive branches of the Government in the absence of a showing that a private right protected either by the Constitution or by law has been invaded.

This Court has passed squarely upon this proposition in the case of *Procter & Gamble* v. *United States*, 225 U. S. 282. The issue involved in this case was whether the Commerce Court had power to compel the Interstate Commerce Commission to enter an order granting relief to the Procter & Gamble Company as a petitioner to the Commission in which it objected to certain regulations concerning demurrage.

The Commission in declining to act upon the petition made a report declaring that the rules complained of were in no sense contrary to the act to regulate commerce, and on the contrary conformed to that act and tended to prevent and repress unlawful preferences and discriminations.

The issue thus raised was whether the courts had power to inquire into the validity of an order of the Commission of a negative character in the sense that the order so made did not seek to compel action on the part of others; that is, have the courts power to control the Commission's action where it declines relief, leaving the parties to the proceeding as they were? Again, of course, to such negative action of the Commission would be a permissive order, as in the instant case, in which the

parties to the same are authorized to act as volunteers.

The United States and the Interstate Commerce Commission appearing for the purpose, challenged the jurisdiction of the court to entertain the cause, and moved to dismiss the same—

> "'Because the order of the Interstate Commerce Commission complained of *directed no affirmative relief* and the negative order of the Commission dismissing the complaint affords no ground for an action in this court;' and upon the following more detailed specifications filed on behalf of the United States:
>
> '(a) It prays that the order of the Interstate Commerce Commission be enjoined, when said order *directed no action against any party and therefore the same is not subject either to enforcement or to injunction.*' * * *" (italics ours).

The reasons for dismissal above assigned apply accurately to the form of order in the instant case. The court speaking through Mr. Chief Justice White in sustaining the motion to dismiss the bill held that the words of the second subdivision of the Commerce Court Act, referring to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission, "confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders, rendered by the Commission and confer power *to relieve parties in whole or in part from the duty of obedience* to orders which are found to be illegal."

An action to relieve a party from the duty of obedience to an order necessarily means that such order must be mandatory in respect of such party or his affairs.

Considering the first subdivision of the act relating to the enforcement of the Commission's orders in connection with the second, above referred to, the court said:

> "In other words, by the cooperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order."

There does not inhere in an order of the Commission reading that a specific act is "approved and authorized" the question of enforcement, for all parties come to such an occasion as volunteers.

It is obvious under the principle announced in the Procter & Gamble case that if the Commission had refused to approve and authorize the purchase by the New York Central of the River Road stock, and the leasing of the Junction properties to the River Road, the New York Central could not have invoked the jurisdiction of the courts to compel the Commission to take action in the premises.

On the other hand, the Commission, having entered a permissive order of approval and authorization, it is likewise obvious that no stockholder of the New York Central could invoke the courts to set such order aside as being unwarranted in law, since the parties to whom it is addressed come to its terms as volunteers. True

if such stockholder could show injury to his own interests it might possibly be argued that he could file a stockholder's suit to enjoin his corporation from committing an *ultra vires* act (assuming that for a corporation to act upon authority alleged to be erroneously given by the Commission under paragraph (2) of Section 5 of the Act could be so regarded), but such a proceeding would in no wise involve the Commission or the United States as necessary or proper parties, since no relief in such case could be asked against the Commission. The concomitant of annulment of the Commission's order is injunctive relief against its enforcement, but the Commission has required nothing of the parties to which its permissive order is addressed, and it certainly cannot be called into court to defend its action in respect of a subject matter with which it can have no privity of relationship, namely, the alleged *ultra vires* acts of the corporation. Such a case would, therefore, come to the district court as an ordinary stockholder's proceeding in equity, and would not have been within the jurisdiction of the Commerce Court, and is consequently not within the jurisdiction of the District Court under the provisions of the Urgent Deficiency Appropriations Act. The plaintiffs, however, are much farther removed than a stockholder from bringing the Commission in the name of the United States into court, for they are strangers to the defendant railroad companies and cannot complain of their alleged usurpation of powers. Nor is it an answer to this to say that the defendant railroad companies as opportunists in their position because of the order of the Commission can commit wrongs against the plaintiffs, for if they did so their acts would have no

identity with the order of the Commission. Finally it should be added that it is impossible to discover in the bill any charge that the acts of the defendant railroad companies are *ultra vires* except by inference, or whatever their nature that they have caused the plaintiffs any legal injury.

In the Procter & Gamble case Mr. Chief Justice White said:

> "Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452."

The above quoted language, as the authorities universally show, is to be read in its relation to controversies involving the question of taking through the enforcement of the Commission's order the plaintiff's property without due process of law or interfering with his rights in some other form protected by law.

3. THE ORDER OF MAY 16, 1922 DID NOT AFFECT THE RIGHTS OR INTERESTS OF THE PLAINTIFFS IN ANY RESPECT.

This Court has specified many times the several purposes for which the Federal courts may re-examine the findings and orders of the Interstate Commerce Commission. One of its concise statements in this respect is found in the case of *United States* v. *B. & O. R. R. Company*, 225 U. S. 306. In this case the court said:

> "We have determined in the *Procter & Gamble Case, ante* p. 282 that the Commerce Court was but endowed in considering whether an affirmative order of the Commission should be *enforced* on the one hand or set aside and declared *non-enforcible* on the other with the jurisdiction and power existing at the time that act was passed in the Circuit Courts of the United States. And as, at that time, it was conclusively settled that the courts had only authority to re-examine the findings of the Commission as to subjects like the one here under consideration, for the purpose of ascertaining whether the action of the Commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the court below was likewise limited in passing upon the petition before it in this case. This being true, it is also necessarily true that virtually the sole authority of the court below was in a sense confined to determining questions of law arising upon the case as presented on the face of the pleadings."

See also *I. C. C.* v. *Union Pacific,* 222 U. S. 541, and *I. C. C.* v. *Illinois Central,* 215 U. S. 452 at page 70.

Since the District Court as successor of the Commerce Court is given no statutory powers to review the orders of the Commission, its jurisdiction can be invoked in the above instances mentioned by the court only to prevent an unlawful invasion of a private right. Whatever be the nature of the question coming before the court, with respect to the activities of the Commission, in the last analysis it can have no other duty than this.

In *Reagan* v. *Farmers' Loan & Trust Company,* 154 U. S. 362, Mr. Justice Brewer, in discussing the province of the Federal Courts with respect to orders of the Commission prescribing rates, makes the principle stated very clear. He says:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function." * * *
>
> "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation." * * *

> "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection *which is the constitutional right* of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property." * * *

In the instance of an order of the Commission granting to a volunteer the right to exercise a franchise there cannot inhere in the situation an act of government which could be challenged for invading a private right.

An act of a legislature applies to all; no one without alleging a particular injury as a result of its enforcement can complain of its unconstitutionality.

The permissive order of the Commission in the present instance putting in force the application of paragraph (2) of Section 5 of the Interstate Commerce Act has no greater reaction upon the plaintiffs' interests than if Congress had passed a special act authorizing The New York Central Railroad Company to acquire control of the Chicago Junction properties. In such case it is obvious that unless such act took the plaintiffs' property without due process of law, or otherwise invaded their rights, they could not complain of its alleged unconstitu-

tionality. That in the present instance the complaint is based upon the allegation that the Commission, in sanctioning the franchise accepted by the New York Central, has not acted within the scope of its powers, is a distinction without a difference in the application of the above stated principle, for from the standpoint of the right of the judicial branch of the Government to interfere in the activities of the legislative branch of the Government it is obvious that it is one and the same thing to complain that the legislative department has exceeded its powers by passing an unconstitutional law and that the legislative agent has exceeded its powers by not following the mandate of its principal.

The order of the Commission in the present case represents a conspicuous instance of an administrative body functioning purely in a legislative capacity, for the Commission acted in a prospective situation by determining that facts existed which made applicable to the same a Federal statute. An exactly parallel instance of legislative action would have been that of a committee of either house of Congress reporting that upon an investigation of facts it recommends the passing of a special act of Congress authorizing The New York Central Railroad Company to acquire by purchase of stock and by lease the acquisition of control of the Chicago Junction properties.

As said in the case of *Borgnis* v. *Falk Co., supra,* "Manifestly the legislature cannot remain in session and pass a new act upon every change of conditions; but it may and does commit to an administrative board the duty of ascertaining when the facts exist which call into activity certain provisions of the law."

It is therefore obvious that the inquisition into facts upon which, in the one case, a law of specific application is brought into being, and, in the other case, an existing law of contingent application is brought into play, has exactly the same legal significance. In neither case is a judicial or a quasi-judicial act performed. It is only a legislative step that has been taken—not in, and of itself, to be complained of.

Paragraph (2) of Section 5 of the Interstate Commerce Act is a statute of privilege and not of restriction. It is, in effect, either an act granting a corporate franchise or an act specifying instances in which an existing corporate power may be exercised. In either case it could not be conceived of as an act that in its application would in and of itself take property without due process of law, for a grant of a Government franchise is not subject to attack at the instance of a private individual.

The plaintiffs therefore cannot complain of the act of the New York Central in entering into control and possession of the Junction properties upon sanction of an order of the Interstate Commerce Commission alleged to have been illegally made, for they are strangers to the franchise thus claimed by them to have been unlawfully granted to the defendants, the New York Central and the River Road, and it is not of legal consequence whether their claim be based upon the application of an alleged unconstitutional statute or an alleged unlawful granting of a franchise under a constitutional statute.

The plaintiffs can only complain when the defendant railroad companies unlawfully trespass upon their rights. Such defendants might do this as an incident

of their possession of the Junction properties, but not because of their possession of the same. Therefore, the exercise by the defendant companies of the authority granted them by the Commission has no relation as such to any duty legal or equitable that they may owe to the plaintiffs.

The proposition may be stated in another form as follows:

Though the incident of the control by the New York Central of the River Road and by the latter of the Junction properties may make it possible for them in the operation of those properties to do an unlawful act against the plaintiffs, the responsibility for any such act could certainly not be traced to the usurpation of a tenure in the premises contrary to legal sanction. Under the doctrine of legal causation the one act is in no sense a product of the other. Therefore the permissive order of the Commission has no relation, proximate or remote, to the affairs of the plaintiffs. In other words, the defendant companies being volunteers in the situation how can the order of the Commission amount to a taking of the plaintiff's property without due process of law?

And it should also be added that since it appears that the plaintiffs do not allege that the defendant companies are unlawfully discriminating against them contrary to the provisions of the Interstate Commerce Act, and, indeed, could not well make any such allegation, prior to submitting such claim to the Interstate Commerce Commission, it follows that the bill discloses no issue involving a Federal question.

4. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST WITHIN THE MEANING OF THE PROVISOS CONTAINED IN SECTION 5 OF THE COMMERCE COURT ACT.

Section 5 of the Commerce Court Act provides:

> "That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; * * *"

The purpose of the above quoted provision was to make possible the adjudication in one proceeding of the rights of all parties entitled under principles of law or equity to protection against the order of the Commission. It was not intended to prefer those who were parties to the proceeding before the Commission over those who were not by giving the former a statutory right to court review not based upon a showing of legal injury that was not to be enjoyed by the latter. The Courts have made it clear that no such advantage exists and are conclusive upon the proposition that the term "party or parties in interest" as used in the above quoted provision does not include parties other than those entitled to invoke the intervention of the Federal Courts to prevent the orders of the Commission from unlawfully invading rights of property or other interests entitled to a court's protection.

Directly in support of the above statement is the case of *Edward Hines, Yellow Pine Trustees, et al.* vs. *United States*, No. 91, decided by this court on November 12, 1923, in which it was held that the plaintiffs seeking by bill in equity to set aside an order of the Commission could not maintain the suit merely by showing (if true) that the Commission was without power to make the order and that they must show also that the order alleged to be void subjects them to "legal injury, actual or threatened".

The facts of the case are in principle upon all fours with those of the case at bar. The first paragraph of the opinion reads:

> "This suit was brought against the United States by an Illinois lumber concern in a federal court for Illinois to set aside as void an order entered by the Interstate Commerce Commission against carriers on February 11, 1922. The Commission and the American Wholesale Lumber Association—the petitioner in the proceedings before it—intervened in this suit as defendants. No carrier intervened. The plaintiffs had not been parties to the proceedings before the Commission, nor were they named in the order assailed. The United States moved to dismiss the bill on the ground that the plaintiffs had not shown such an interest in the subject matter as would entitle them to sue; and also for want of equity. The case was heard before three judges on application for a preliminary injunction. It was agreed that the hearing should be treated as a final hearing. The court sustained the motion of the United States and entered a final decree dismissing the bill. That decree is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220."

The issue raised by the plaintiffs was the question of the power of the Commission to make an order requiring certain carriers to cease and desist from collecting a certain penalty charge of $10.00 per car per day on lumber held at reconsignment points, the abrogation of which penalty benefitted the competitors of the plaintiffs. The court in holding that the plaintiffs could not question the validity of the Commission's order said:

> "The mere fact that plaintiffs were not parties to the proceedings in which the order was entered does not constitute a bar to this suit. For it is brought to set aside an order alleged to be in excess of the Commission's power. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557. But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges cancelled. *They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do.* It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry.*, 218 U. S. 88, 111. Plaintiffs' right is limited to protection against

unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection. The correctness of those findings cannot be assailed here; among other reasons, because the evidence on which they were made is not before the Court. *Louisiana & Pine Bluff Railway Co. v. United States*, 257 U. S. 114.

The further claims of plaintiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car shortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate, may be diverted, at some time in the future, from transportation uses. If their fears are realized it will be open to them to apply to the Commission for relief. *As the plaintiffs do not show any interest which entitles them to sue, we have no occasion to consider either the power of carriers to impose the penalty charge or the power of the Commission to order its cancellation.*" (Italics ours.)

Note particularly the statement contained in the excerpt from the opinion that "It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered."

If the statement thus made be of significance in an attempt to set aside a mandatory order of the Commission how much more significant in the instant case is the fact that the order attacked was permissive and that the defendant companies took advantage of it as volunteers.

Another excellent statement of the proposition is found in the case of *Peavey & Co.* v. *Union Pacific R. Co.*, 176 Fed. Rep. 409, heretofore cited. This case was decided by Judges Sanborn, Hook, and Adams, sitting as the Circuit Court for the Western District of Missouri, Western Division. The Interstate Commerce Commission had entered an order forbidding a carrier to allow or pay to the owner of an elevator any compensation for elevation in transit of grain, except in certain cases.

Diffenbaugh and others filed a bill in equity to enjoin the Commission's order on the ground that it was beyond the power of the Commission. The parties were the Transportation Committee authorized to represent the Board of Trade of Kansas City, which was an association of 200 members, consisting of operators of grain elevators, millers and dealers in grain. The bill in equity was demurred to, and one of the objections raised on the demurrer was that the complainants were not parties to the proceeding before the Commission upon which the order challenged was based.

The court in overruling this point held that a careful search of the Interstate Commerce Act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the Commission; that the proceeding in the court was not an appeal; that it was a plenary suit in equity; that the jurisdiction to hear and determine such suits was vested in the Circuit courts; and that the determination of the question what parties may maintain such suits was left by the Interstate Commerce Act to the general rules and practice in equity, and that under them any party whose rights of

property are in danger of irreparable injury from an unauthorized order of the Commission may appeal to a Federal court of equity for relief.

Upon appeal of this case to this Court under the title of *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, this court stated that it was contented to leave the question of jurisdiction on the statement of the court below. While these cases were decided before the enactment of the Commerce Court Act they show, by holding that the right to proceed in a court of equity to enjoin the enforcement of an order of the Commission is not limited to parties appearing in the proceeding before the Commission upon which such order was based, that there is no particular significance to be given to the term party in interest as used in Section 5 of the Commerce Court Act.

The proviso above quoted from Section 5 did not enlarge the jurisdiction of the courts of equity to adjudicate questions which could not otherwise be brought before them solely by reason of the fact that the propounder of any such issue had been made a defendant or had intervened in the Commission proceeding.

A further case in point is that of *McLean Lumber Company* v. *United States*, 237 Fed. Rep. 460, the opinion in which was rendered by Judges Warrington, McCall and Sanford, sitting as the District Court in the Eastern District of Tennessee, Southern Division. In this case four corporations engaged in business at Chattanooga, Tennessee, filed a petition against the United States to set aside certain orders made by the Interstate Commerce Commission in the matter of rates on logs in

carload shipments. The record shows that the increased rates on the logs fixed by the orders of the Commission had caused the plant of one of the petitioners to be wholly abandoned, that of another to be shut down, and those of two others to be greatly limited in their operations. The court held that the right of a shipper to have his property carried at a reasonable rate in the transaction of his business is a property right; that to enforce such right our system of jurisprudence does not leave him remediless; that where an action at law is inadequate a remedy in equity must and does exist; that the common-law remedy is so abrogated by the Interstate Commerce Act that a shipper cannot now, consistent with its provisions, maintain his common-law action for excessive rates exacted on interstate shipments, where such rates have been duly published by the carrier and not found by the Commission to be unreasonable; and that in such case a shipper must primarily invoke redress through the Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable.

It follows that when rates fixed by an order of the Commission are unreasonably high, and thereby invade his property rights he has an appropriate remedy to protect his interests in the Federal courts. The court thereupon held that the petitioners by filing their petitions before the Commission complaining of the new rate which the railroad companies proposed to establish, acquired a legal status before the Commission as parties in interest to the proceedings had upon such complaint.

The court then says:

> "Construing the foregoing provisions of the Commerce Court Act in their entirety, we are of opinion that it was intended that any person who had acquired a standing *as a party in interest* in proceedings before the Commission should have the right to appear as a party in any suit brought in the court involving the validity of an order therein made by the Commission, as distinguished from the mere right of intervention given to other persons who were *not parties in interest* before the Commission, but merely '*interested in the controversy or question*,' and that the right thus given to a party in interest before the Commission is not limited to his appearance as an intervener in such proceedings as may be instituted by other parties in interest before the Commission, but includes the right to appear in the court as a party plaintiff in proceedings which he himself may bring to test the validity of the order of the Commission. And we hence conclude that, under the statutory provisions above quoted, the petitioners herein, having duly appeared before the Commission as complainants against the rates proposed to be established under the new schedule filed by the railroad company, not only became parties in interest before the Commission in the proceedings had upon such complaint, but that as such parties in interest in such proceedings they are now entitled, as of right, to appear as parties plaintiff under their petition in this court in proceedings to set aside the order of the Commission." (Italics ours.)

The language above quoted would seem to suggest that the court placed a special significance upon the fact

that the plaintiffs in the equity proceeding had appeared in the proceeding before the Commission. However, an analysis of its conclusions shows that it made a clear distinction between a party in interest having a property right to protect and thus entitled to initiate a proceeding in court, and one who was merely "interested in the controversy or question". The latter, under Section 5 of the Commerce Court Act, might intervene in an existing controversy having proper parties on both sides, but obviously could not initiate a proceeding because of being a stranger in interest to the concrete case.

Moreover the court was required to attach significance to the fact that the plaintiffs had appeared before the Commission, for, as the court said, in the instance of protecting one's common law rights against the exaction of an unreasonable rate, the Commission has succeeded the courts as the body to be primarily invoked for redress.

In *Nashville Grain Exchange* v. *United States* (case 46) and *Louisville & Nashville Railroad Company* (case 47), 191 Federal Reporter 37, the court held that the Grain Exchange and the Board of Trade were parties in interest within the meaning of Section 5 of the Commerce Court Act because the petitions and affidavits in the cases showed that the enforcement of the order would result in the destruction of the existing business of grain dealers of Nashville, and that said grain dealers are members of the Nashville Grain Exchange and the Nashville Board of Trade.

The court said that, while there may be room for argument as to the character of the interest which such

communities, associations, corporations, firms, and individuals should have in the controversy in any suit in this court, there certainly can be no question but that the petitioners in case No. 46 are interested in the question to be decided in case No. 47.

In the case of *Atlantic Coast Line R. Co.* v. *Interstate Commerce Commission*, 194 Federal Reporter 449, it was specified, as a ground of demurrer to the bill in equity brought to annul the order of the Commission prescribing a rate alleged to be unreasonable, unjust and unduly discriminatory, that the Georgia Railroad, the Norfolk & Western Railway Company, the Clyde Steamship Company, and the Old Dominion Steamship Company were not parties to the proceeding before the Commission which resulted in the making of the order complained of, and that, therefore, there is a misjoinder of petitioners. The court held that the carriers named, although not parties to the proceeding before the Interstate Commerce Commission, nor named in the order made by the Commission fixing rates on commodities between certain points, were competitors of the carriers subject to the Commission's order and were therefore necessarily affected by the order. Under such circumstance they were held to have such an interest as entitled them to be joined as parties complainant with the petitioning railroad company made subject to the Commission's order to enjoin its enforcement.

Counsel cite this case in support of their argument. In so doing they ignore the significance of the fact that competitors made up both of carriers subject to the Commission's order to reduce rates and those who were not so subject were making common cause to annul the order.

In such case all parties obviously had to meet the prescribed rate and were therefore directly affected by the order. Such a situation bears no resemblance to an instance where one carrier seeks to prevent another carrier from acquiring control of a railroad because of a fear that the latter will thereby gain an advantage in opportunity to solicit competitive traffic. In the instant case the permissive order of the Commission authorizing the acquisition required nothing of the defendant railroad companies calling for responsive action by their competitors, and it certainly gave no license to such defendants to commit a legal injury direct or indirect upon the plaintiffs.

In the case of *Merchants & Manufacturers' Traffic Association* v. *United States*, 231 Fed. Rep. 292, the court held that traffic associations formed for the purpose of representing jobbers and merchants had an interest, as representatives of a class, directly affected by the Commission's order suspending in a particular case the application of the long and short haul requirements of Section 4 of the Interstate Commerce Act, entitling them to file a bill in equity seeking the suspension of such order. The jurisdiction was sustained wholly upon the principle of class suits and Equity Rules No. 37 and No. 38, providing, respectively, that all persons having an interest in the subject matter of the action and in obtaining the relief demanded may join as plaintiffs, and that when the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

This case was reversed by this Court in the case entitled *United States* v. *Merchants' etc. Association,* 242 U. S. 178. While this court did not directly pass upon the reasoning which the court below regarded as sufficient to permit the traffic associations to file the bill as parties in interest it held that to redress the grievance of which they complained was to invade the administrative powers of the Commission.

In the case of the *City of New York* v. *United States,* 272 Fed. Rep. 768, the court, while denying relief on the merits, held that the City had the right to maintain a bill to enjoin the enforcement of an order fixing rates to be charged by two railroad companies. The Court said:

> "The city, by reason of its interest in its duty to the residents and taxpayers of the locality, *together with its interest as a shipper and receiver of milk and cream for its institutions, has, as such, a right to legally commence and maintain this suit.* It also has such interests in the Staten Island Rapid Transit Railway Company, as well as an interest and rights in the franchise of said railway company." (Italics ours.)

In *Village of Hubbard, Ohio* v. *United States,* 278 Fed. Rep. 754, it was held that the Village could enjoin an order of the Commission fixing rates where the order was beyond the jurisdiction of the Commission, and where the order affected the franchise granted by the Village. The Court said:

> "* * * if a franchise contract made by a municipality with a carrier is the basis of the inquiry,

> that municipality should be made a party and be given an opportunity to be heard, and, if so, it has the same right as any other party in interest to seek redress in this court against an erroneous or unlawful order of the Commission."

In the case of the *State of Tennessee* v. *United States*, 284 Fed. Rep. 371, the court held that the right of the State, either in its own interest as a contingent shipper, or in the right of its citizens, to attack an order of the Interstate Commerce Commission affecting rates within the State, seems not to be doubted. The court in so holding was undoubtedly correct, as the right of the State to have its property transported free or at a reduced rate was one given by the Interstate Commerce Act and is a property right, the protection of which would entitle the State to seek the aid of the courts.

In the case of *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485, the State filed an original bill in this court to restrain the carriers from applying an order of the Interstate Commerce Commission increasing intrastate rates in North Dakota. The Court refused to entertain jurisdiction of the bill on the ground that the State should be remitted to the remedy provided by the United States statutes, namely, a suit to set aside the order brought against the United States in the District Court as provided by the Commerce Court Act and the Act transferring its jurisdiction to the District Court. The contention was made that the state cannot sue on account of private grievances of its citizens. The Court, in refusing to pass on this question and deciding the case upon the ground above stated, said:

"The defendants move to dismiss the bill. The first reason offered is that a State cannot sue on account of the private grievances of its citizens. By an amendment the State alleged a property interest in itself but that amendment did not cover the extent of the relief asked, and the case is argued on the broad ground originally taken. We shall leave this question on one side, without deciding whether this case can be distinguished from *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 220 U. S. 227, 286, et seq."

In *Oklahoma* v. *A., T. & Santa Fe Ry.*, 220 U. S. 277, it was held that a State in its corporate capacity has no such interest in the rights of shippers as to entitle it to maintain an original action in the Supreme Court against a carrier to restrain it from charging unreasonable rates within its jurisdiction. In that case this court said at pages 286, 287 and 289:

"In the present case, the State seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement, plaster, brick, stone, crude and refined oil. But the State, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates and to compel the railway company to respect the rights of *all* of the people of Oklahoma who may have occasion to ship such commodities over the railway. * * * We are of opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit 'in which a State shall be

> a party,' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally".

In view of what this court said in the case of *North Dakota* v. *Chicago & N. W. Ry. Co., supra*, it is questionable whether it would hold that a state is a proper party to maintain a bill to enjoin an order of the Commission unless it is established that some property or other right of the State, either as shipper or otherwise, is violated by the order.

The above authorities demonstrate that in every case where an attempt to invoke the jurisdiction of a court of equity to set aside or enjoin an order of the Commission was sustained it was at the instance of a party whose legal or equitable rights were destroyed or impaired by the order of the Commission.

If, as decided in *McLean Lumber Company* v. *United States, supra*, the proviso in Section 5 of the Commerce Court Act authorizing a party in interest to appear of his own motion and as of right in any suit wherein is involved the validity of an order of the Interstate Commerce Commission and the interests of such party includes the right to initiate any such proceeding, then it is beyond question that he must so proceed to prevent the destruction or impairment of his legal or equitable rights. As no legal or equitable rights of the plaintiffs in this case have been violated by the order of the Commission they have no standing to maintain the bill here filed, even though they have been permitted to appear

before the Commission in opposition to the application of the defendant railroad companies.

5. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST UNDER THE PROVISIONS OF THE INTERSTATE COMMERCE ACT:

The plaintiffs' sole justification for initiating this proceeding is set out in Subdivision XII of their bill. They base their claim for equitable relief upon the proposition that the acquisition of control by the New York Central of the Junction and River roads approved and authorized by the Commission in its said order has resulted in diverting a large portion of competitive tonnage from the rails of the plaintiffs to the rails of the Central, or other routes in the New York Central System, causing an annual loss of revenue to the plaintiffs of $10,000,000, that such diversion, with consequent loss of revenue constitutes irreparable loss and injury.

The public interest as regulated by the Interstate Commerce Act is not concerned with the fact that The New York Central Railroad Company in acquiring control of the Chicago River & Indiana Railroad and Chicago Junction Railway properties may develop opportunity in fair competition with its competitors to gain traffic that might otherwise move over the lines of its competitors.

Speaking of this very question the Commission said in its report:

> "The present management of the Central disclaimed any intention of making any changes in the method of handling competitive traffic or the general plan of operating the Junction properties, and those assurances may be taken at their face

> value, especially since the contrary policy would clearly be against the self interest of the Central, in that it would thereby lose the good will of the shipper. There is, of course, every indication that the Central will be able to build up its own line-haul traffic as the result of its connection with the management of the Junction, and it by no means follows that harm to the public may result from legitimate effort and initiative to that end." (Record 22.)

It is the intent of the Interstate Commerce Act, particularly as amended by the provisions of the Transportation Act, to promote the public interest by developing and intensifying competition among common carriers in a fair field. This is evident not only from express declarations, contained in the Act, but because the chief benefit to be derived by the public from private ownership of common carriers is to be found in enterprise stimulated by rivalry among carriers to secure business.

In the case of *United States, et al.* v. *Illinois Central R. R. Co., et al.*, Nos. 40 and 38, decided January 7, 1924, this court said:

> "The effort of a carrier to obtain more business, and to retain that which it had secured, proceeds from the motive of self-interest which is recognized as legitimate;"

A fair field means the right of each carrier to use its own railroad and its own terminals and facilities to promote business without the handicap of unfair methods on the part of its competitors where its facilities come in contact with theirs in the handling and the development of traffic.

Competition means the right of each carrier to take all legitimate opportunity to promote its own business both by developing industrial territory where it did not exist before, by physically extending and developing its terminals, where so to do would be to make its operation more economic and would promote shipping facilities, and by seeking to increase by all fair means its proportion among competitors of existing business through enterprise in service, for in the encouragement of the incentive on the part of each carrier to extend its facilities and to improve its service lies the surest means of promoting the public interest.

The Interstate Commerce law protects each carrier in the above respects by providing for equality among all in the interchange of traffic and by even giving opportunity in the public interest for one carrier upon reasonable terms and compensation to use, under certain circumstances, the terminals and facilities of another.

Paragraph (3) of Section 3 requires that all carriers shall "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Paragraph (4) of Section 3 gives the Commission power, if it finds it to be in the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, "to require the use

of any such terminal facilities * * * by another carrier or other carriers" upon just and reasonable terms.

In the absence of an agreement among carriers (except in the case of emergency provided for in paragraph (16) of Section 1) the Commission has no power under the law to control or regulate the division of traffic. Paragraph (1) of Section 5 of the Interstate Commerce Act authorizes the Commission after hearing upon application of carriers who desire to divide traffic and earnings to permit them so to do, but such authority can be given only when the Commisison is of the opinion that it "will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition." In such case all carriers must assent to the division so authorized by the Commission.

Thus the Interstate Commerce Act by its negation of the right of the Commission to regulate without the consent of carriers the division of traffic emphasizes the idea that the appropriation by one carrier of the business of another through competition is not only not of itself injurious to the public interest but, indeed, is in furtherance of the same to the extent that such business is acquired through superior service and enterprise.

It is thus the declared policy of the Interstate Commerce Act that in the public interest competition among carriers to develop and acquire traffic shall be as free as possible.

It, therefore, follows that the loss of business by one carrier through the development of the terminals of another carrier does not fall, as a matter of investigation, within the scope of the terms public convenience and necessity and public interest, as used in the provisions of the Interstate Commerce Act.

6. THE PLAINTIFFS ARE NOT PARTIES IN INTEREST AS DEFINED BY PRINCIPLES OF EQUITY:

The bill on its face shows it to be in substance if not in form a proceeding brought by several carriers against a competitor to enjoin the latter from exercising certain powers on the ground that such powers are *ultra vires* or based upon a franchise or license alleged to have been unlawfully granted.

The authorities all sustain the proposition that competing carriers have no peculiar interest which entitles them to enjoin a rival from exercising powers which are *ultra vires* or founded upon franchises that are questioned.

In the case of *Railroad Company* v. *Ellerman,* 105 U. S. 166, the City of New Orleans had been authorized by charter and statute to erect and maintain wharves within its limits. A subsequent statute granted the right to a railroad company to occupy a certain area for wharfage purposes, exempt from control by the municipal authorities. Ellerman, as assignee of the city, complained of an alleged invasion of his wharfage rights. Mr. Justice Matthews in rendering the opinion of this court that the claim was without merit made the following observations (p. 173):

> "The sole remaining question then, is whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with

himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the company. *But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. *The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable*

right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." (Italics ours.)

In *Geneva-Seneca Electric Co.* v. *Economic Power & Construction Co. and City of Geneva*, 136 App. Div. (NY) 219, it was held that a corporation furnishing electricity to a city under a non-exclusive franchise cannot maintain an action to enjoin a competing company from furnishing a similar service upon the ground that such company lacks corporate existence. In that case, the Court said (p. 222):

"In this case, so far as I am able to understand the facts, the proposition is this: A corporation legally constituted is serving a city and its inhabitants with electric lighting and power having no exclusive franchise. It is conducting a profitable business. Another alleged corporation, which we assume has no corporate rights, assumes with the consent of the city to engage in the same business. Can such first corporation complain because the acts of the other, although in violation of law, may tend to decrease its revenue or earning capacity? * * * The primary question in this controversy is: Has the plaintiff the right to attack the validity of the defendant power company? * * * In this case there is no question of public nuisance, but rather it resolves itself into the proposition as to whether the plaintiff may attack the validity of the incor-

poration of an alleged competing company, which competition will injure or impair the business of the plaintiff. We think that upon authority the plaintiff's contention is not tenable. (Old Forge Co. *v.* Webb, 31 Misc. Rep. 316; aff'd., 57 App. Div. 636; Empire City Subway Co. *v.* Broadway & Seventh Avenue R. R. Co., 87 Hun, 279; aff'd., 159 N. Y. 555.) * * * We conclude that the whole trend of authority is to the effect that such plaintiff cannot in an action brought to obtain an injunction question the authority of the competing corporation or the right of the individual in the premises. If such were not the law, then every corporation could raise the question as to the legality of its competing neighbor. * * * It seems to me clear that such question should not be left to warring competitors, but that if an alleged corporation is seeking to exercise corporate rights in violation of law, in the first instance the Attorney-General of the State should be asked to take proceedings to prevent the exercise of such alleged power. *If the contention of the plaintiff should prevail, it would be competent for every corporation to bring suit against every other alleged corporation competing with it, because of the fact, as alleged, that it had not fully complied with the provisions of law respecting its incorporation.* It seems to me that it is the most sensible rule to hold that such action cannot be maintained because of the fact that an alleged competitor may not have been organized in accordance with the provisions of law. * * *" (Italics ours.)

The case of *The Christopher & Tenth St. Ry. Co.* v. *The Central Crosstown R. R. Co.*, 67 Barb. (NY) 315, in-

volved the right of the defendant to lay its tracks and run its cars on certain streets. The Court said (p. 317):

> "The rights conferred upon the plaintiff by its charter are not exclusive, and do not prevent the legislature from conferring authority to fix the terminus of the defendant's road at the North River, at the point designated. Nor does it confer upon the plaintiff the power or duty of interfering to protect the public interest, either on behalf of the city or of the general public. If there was any excess of power in the claim of defendant to run its track to the point in question, the public alone could interfere to restrain it by injunction, unless it should be shown that some actual interference with the tracks as laid at that time by the plaintiff had been done, or was about to be attempted."

In the case of *New England R. Co.* v. *Central Ry. & Elec. Co. et al.*, 36 Atl. 1061, the Supreme Court of Errors of Connecticut, in answering an attempt of a street railway company to enjoin a rival from constructing a competing line, said following *Railroad Co.* v. *Ellerman, supra:*

> "The only injury, then, of which the plaintiff could be heard to complain in the court below, was an invasion of some of its legal or equitable rights. If none of these were threatened by the acts complained of, the plaintiff was not entitled to the injunction. Now, if any right at all of the plaintiff's legal or equitable, was threatened or invaded, by the *ultra vires* acts complained of, it was the claimed right to be free from the injurious competition of a rival in the business of carrying passengers and freight; and the question is

whether any such legal or equitable right existed in favor of the plaintiff upon the facts set up in the second count. Counsel for the plaintiff concedes that no such right exists in favor of the ordinary private corporation. * * * But the franchise of the plaintiff is not, under our law, exclusive in any such sense. The plaintiff has not, and does not claim to have, a monopoly, in this sense, of the business of carrying freight and passengers between Hartford and New Britain. It cannot and does not claim, under the second count, that, if the defendants had been acting *intra vires*, in doing what they proposed to do, it would have been entitled to an injunction. Any individual is at liberty to engage in the business of carrying passengers and freight between Hartford and New Britain. * * * The defendants, if acting *intra vires* in building the proposed street-railway line, were at liberty to engage in the same business; and in each of these cases, although the existence of such a competitor might more or less seriously diminish the plaintiff's receipts, it would be without redress at law or in equity, because the competition would be lawful, both as against the state and the plaintiff, and no right of the plaintiff, legal or equitable, would be invaded by such competition. * * * The acts complained of in the second count are merely *ultra vires* acts, illegal in a certain sense as against the state, but in and of themselves invading no right, legal or equitable, of the plaintiff. Neither the plaintiff's charter, nor any law of this state, imposed a duty upon the defendants towards the plaintiff not to build a railway deviating from the chartered route, or not to build one beyond the chartered termini, or not to exercise powers and rights not granted to them. The

> state or the stockholders may restrain the defendants from exercising powers not conferred by their charters, but this does not confer any right of action in this respect upon the plaintiff, unless its own legal or equitable rights are invaded by such exercise."

In L. R. A. 1916 B, page 1087, appears an annotation on the right of a public service corporation to challenge the power or privileges of a rival. The authorities cited are in harmony with the principle case to which the annotation is attached, appearing in the report at page 1083, namely, *Baxter Tel. Co.* v. *Cherokee Co. Mut. Tel. Assn. et al.*, 94 Kan. 159, 146 Pac. 324.

In this case it was held that a telephone company had no interest in the establishment of a second company in a competitive field, which would authorize it to maintain a suit to restrain a rival company because it had not obtained a certificate of public convenience and necessity from the Utilities Commission. On this point, the Court said:

> "From these rulings of the trial court the plaintiff below submits two propositions for our consideration: (a) Has the Baxter Telephone Company such a peculiar interest in this matter, different from the general public, that it may maintain this suit in its own behalf * * *. Ordinarily the usurpation of a corporate privilege or public franchise can only be challenged by an action in the name of the state by its proper officer. In Kansas that proper officer would be the county attorney. Gen. Stat. 1909, Sec. 2226; Eble *v.* State, 77 Kan. 179, 93 Pac. 803, 127 Am. St. Rep. 412. The Attorney General is likewise frequently

called upon to challenge the exercise of some unauthorized corporate power. *State ex rel. Attorney General* v. *Kansas City Stockyards Co.*, 94 Kan. 96, 145 Pac. 831; *State ex rel. Attorney General* v. *Garfield County*, 54 Kan. 372, 38 Pac. 559.

"The cases of *Houser* v. *Smith*, 80 Kan. 260, 101 Pac. 1001, and *State ex rel. Attorney General* v. *Bentley*, 80 Kan. 227, 101 Pac. 1073, considered together, are instructive. The former, although but briefly reported, was an injunction suit against the county treasurer of Cove County to restrain him from collecting a high school tax on the ground that 'there was and is no high school in said county of Cove which has been established according to law.' The plaintiffs were private citizens and were non-suited. But a radically different result was obtained when an officer of the state challenged the legality of the organization of the high school. In the latter case the organization of the high school was declared void.

"By the railroad and utilities acts the power is conferred upon the attorney for the Public Utilities Commission to challenge the exercise of unauthorized corporate acts. Gen. Stat., 1909, Sec. 7182; Laws 1911, c. 238, Secs. 2, 7; *State ex rel. Attorney for Public Utilities Commission* v. *Wyandotte County Gas Co.*, 88 Kan. 165, 127 Pac. 639. The latter case is quite pertinent. *There the gas company had received the assent of the city to raise the rates for gas; but it had not received the assent of the Public Utilities Commission. In the case at bar the appellee, Baxter Local No. 121, has received the assent of the city, but that of the state commission is still wanting, if*

such assent is required. These illustrations show that, if there is a usurpation of powers by the appellees, the state has provided itself with officers to challenge such usurpation.

"A private plaintiff, who is likely to be injured in some special manner, or whose situation is peculiarly affected by the exercise of a usurped power, could maintain the action, but no such case is presented here.

"In *Coffeyville Gas Co.* v. *Citizens' Gas Co.*, 55 Kan. 173, 40 Pac. 326, it was said:

> 'A corporation organized for the purpose of supplying a city with natural gas, and authorized by an ordinance passed by the city council to use the streets and public grounds of the city for the purpose of laying its mains and pipes, has no standing in court to test the right of a rival company to use the streets for a similar purpose, or the validity of subsequent ordinances, under which the defendant claims the right to use the streets.'

"An especially apt case in this connection is *Amusement Syndicate Co.* v. *City of Topeka*, 68 Kan. 801, 74 Pac. 606, where the owner of an opera house sought to enjoin the use of a large public auditorium for public entertainment for profit. * * *

"Under the demurrer, all the material allegations of plaintiff's petition must be taken as true, but it does not appear that a mere rival in business has such an interest as will permit it to maintain an action of this character. Assuming for the moment that the business of the Baxter Local No. 121 is of such a character that it would require a license from the Public Utilities Commission before engaging in the telephone business in

Baxter Springs, it must be conceded that, in the exercise of a sound discretion, the Public Utilities Commission might grant that license; and, if it did, its competition for public patronage would be just as keen, and it would occupy the streets and diminish and divide the revenues of appellant just as much with a license as without one. Licenses to engage in any trade or calling within the limits of a city are common. Hackmen, draymen, pawnbrokers, and the like are required in most Kansas towns to have licenses issued by the city authorities. But we think the licensees of these callings could hardly maintain an injunction suit against any person who presumed to exercise any such calling without a license; yet the competition of an unlicensed hackman or pawnbroker would tend to lessen the business and diminish the revenues of those lawfully engaged in such business. Doctors, lawyers, and school-teachers require a license or certificate to practice their professions; but none of these could maintain a suit to enjoin another person from engaging in any of their peculiar professions without such certificate, notwithstanding any probable loss of income on account of the invasion of their professions by unlicensed practitioners. We can see no fundamental difference between the telephone business and any other business, except that, owing to its importance and general use, one telephone system is likely to be more satisfactory and less expensive than where two or more such companies occupy the same field. This the Legislature has recognized, and has provided that, as a matter of public policy, no public utility like a telephone company, excepting one strictly mutual, will be authorized to do business until it has obtained a certificate

or a license of authority as a public convenience and necessity within the community where it seeks to do business. This is a part of the state's program for the regulation of public utilities but the administration of that program, and the enforcement of the law pertaining thereto, is vested in public officers authorized to use the name of the state to carry it into execution. Prior to the passage of the public utilities act, any number of telephone companies, which could persuade a city government to grant a franchise for the use of the streets and alleys, might establish a telephone system within such city. The competition of these would affect the business and affect the revenues of other utilities of the same character which had previously been established. The enactment of the public utilities law was an extension of the police power of the state over such utilities, but it did not grant any additional rights to such utilities as were established and maintained before the adoption of that act; and the Baxter Telephone Company procured no rights thereunder which it can maintain against possible competitors. The public utilities law was not enacted as an extension or enlargement of the powers and privileges of an existing telephone company." (Italics ours.)

In *Coffeyville Mining & Gas Co.* v. *Citizens' Natural Gas & Mining Co.*, 55 Kan. 173-179, 40 Pac. 326, cited by the Kansas court, where one company sought to prevent another from interfering with its monopoly of gas business, the court said:

> "A private person or corporation will not be recognized in a court of justice as the guardian of purely public interests, nor to further its private ends by assuming that character."

In *Burns* v. *St. Paul City Ry. Co.*, 101 Minn. 363, 112 N. W. 412, the publisher of a weekly newspaper sought to enjoin a street railway from placing advertisements on the inside of its cars. It was held that the possible loss of business was not sufficient to entitle the plaintiff to question the acts of the street railway, whether *ultra vires* or not.

The following statement appears in the case of *Camblos* v. *Phila. &c. R. Co.*, Federal Case No. 2331:

> "The Adams Express Company is entitled to protection only against such illegal acts of the defendant as are prejudical to its rights and interests. If the railroad company has assumed the exercise of any franchise not conferred by its charter, the express company is not authorized to call it to account. If, without right, it seeks to appropriate the profits of a business of which the express company before had the monopoly, it does not thereby incur any liability to the express company. Their relations to each other grew out of the corporate duties of the defendant as a common carrier, and it is only for a failure or refusal to perform any of these duties to the express company as a shipper that the latter has a right to complain."

The case of *The Golconda Nor. Ry.* v. *The Gulf Lines C. R. R. of Ill.*, 265 Ill. 194, involved a controversy between two railroad companies over the possession of a parcel of ground and the right to occupy it for the construction and operation thereon of a railroad. The court in discussing the right of one company to challenge the powers of the other, said (p. 203):

"We have held that the evidence justifies the conclusion that the Toledo, St. Louis and New Orleans Railroad Company had made a location of its road on July 23, 1909. The sale and conveyance of its located line, right of way, franchise and other property to the appellee, if valid, conveyed to the latter the prior right which the grantor had to construct a railroad on this located line. It is insisted, on behalf of the appellant, that the attempted conveyance to the appellee was contrary to public policy and beyond the power of the grantor, and was therefore void and of no effect whatever. A railroad corporation has not, as a general rule, the power to sell its road and franchise without statutory authority. The powers of all corporations are such, only, as are conferred by the statute under which they are organized, and a public service corporation cannot, without the assent of the state, sell or lease its entire property and franchise to another corporation and disable itself from performing the duties to the public imposed by its charter. (*Chicago Gas Light Co.* v. *Peoples Gas Light Co.*, 121 Ill. 530; *Union Trust & Savings Bank* v. *Kinloch Telephone Co.* 258 id. 202; *Thomas* v. *West Jersey Railroad Co.* 101 U. S. 71; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 id. 24.) *It would not, however, enable the appellant to maintain its bill even if we were to hold the deed of the Toledo, St. Louis and New Orleans Railroad Company to the appellee void.* The only effect of such holding would be to leave the title in the former company, but it would not confer any right upon the appellant or give to it any title or enable the grantors of the Toledo, St. Louis and New Orleans Railroad Company to grant any title to the complainant. The fact that

because of its failure to finish the road and put it in operation within ten years from the time of filing its articles of association section 26 of the Railroad and Warehouse act declares that the corporate existence and powers of that corporation should cease does not affect the question. The State, alone, could take advantage of the failure of the company in this regard, and until it did so no other person could question its existence or the validity of its corporate acts. *Ross* v. *Chicago, Burlington & Quincy Railroad Co.*, 77 Ill. 127; *Chicago and Eastern Illinois Railroad Co.* v. *Wright*, 153 id. 307.

"Admitting that the conveyance by the Toledo, St. Louis and New Orleans Railroad Company was beyond the corporate powers of that corporation, the law does not permit third persons having no interest in the corporation or its trust to dispute the validity of its conveyances. The *ultra vires* acts of the corporation may be objected to by the State, the corporation, its stockholders or creditors, or the persons with whom the *ultra vires* transactions are had, but not by third persons having no interest in the subject matter. Railroad corporations have power, under certain circumstances, to make sales and conveyances of real and personal property. Whether any particular conveyance is in excess of this power is a question which concerns only the corporation itself, the State, or those persons having some interest or title in the corporation or the property involved. * * *

"The appellant has no such interest as entitled it to enjoin the appellee from constructing a railroad in this pass. *The only injury of which it can complain in a judicial tribunal is the invasion of*

some legal or equitable rights. It alleges that the appellee is acting beyond its authority under the law because the conveyance under which it claims was beyond the charter power of its grantor to make. This conveyance, however, did not injuriously affect any right of the appellant, and it has, therefore, no ground to complain. Neither the Toledo, St. Louis and New Orleans Railroad Company nor the appellee owed any duty to the appellant in regard to this land or to the title thereto. A stockholder in the grantor company might have an interest in restraining it within the limits of its corporate powers and the State might have an interest in preventing the usurpation and perversion of its franchises, but the appellant has no interest in these questions and cannot raise them to enable it to seize the property which is the real subject matter of the controversy, *New Orleans, Mobile & Texas Ry. Co.* v. *Ellerman,* 105 U. S. 166." (Italics ours.)

In the case of *New Hartford Water Co.* v. *Village Water Co.*, 87 Atl. 358, where one water company sought to enjoin another water company from laying pipes in streets occupied by the pipes of the plaintiff, the Supreme Court of Errors of Connecticut held that the plaintiff could not question the validity of the defendant's organization or of its acquiring the property of the voluntary association which it succeeded. The Court said (p. 360):

> "Whether the defendant is exceeding its charter powers is a question to be raised only by its stockholders or by the state or by parties who receive some special damage from the claimed *ultra vires* acts. *New England Railroad Co.* v. *Central Railway & Electric Co.*, 69 Conn. 47, 58, 59, 36 Atl.

1061; *Railroad Company* v. *Ellerman*, 105 U. S. 166, 173, 26 L. Ed. 1015. * * *

"The Court has found that the defendant has not done, and does not propose to do, any acts that have been or will be attended by any actual and serious damage to the plaintiff or that interfere with it in the management or maintenance of its water system and charter rights. This finding precludes the defendant (plaintiff), for the reasons already stated, from attempting to question the validity of the defendant's organization or whether it has properly acquired the property and rights of the voluntary association named and recognized as such in its charter."

A case on all fours with the instant case is that of *Home Tel. Co. of Grass Lake* v. *Michigan R. R. Comm.*, 140 N. W. 496. In this case the defendant telephone companies had applied to the Michigan Railroad Commission praying that certain contracts be authorized by said Railroad Commission to be consummated. Such contracts were in effect a sale of the properties of each of the defendant companies to the defendant Michigan State Tel. Co. The plaintiff, together with certain other companies, asked and obtained leave to intervene before the Commission, and a hearing was had as a result of which the Commission authorized the execution of the contracts. The plaintiff then brought this suit to restrain the consolidation of the telephone companies as authorized by the order of the Commission. The Michigan statute authorized *any telephone company or other party in interest*, being dissatisfied with any order of the Commission, to commence an action within thirty days from

the issuance of the order in the Circuit Court in Chancery against the Commission to vacate and set aside any such order. (Sec. 12 of Act No. 138 of the Public Act of Michigan, 1911.)

The ground for the relief was similar to that set up in the instant case. The bill averred "that such merger and consolidation of said companies will give the said Michigan State Telephone Company a monopoly of the telephone business to the exclusion of the independent telephone companies within a portion of the state of Michigan, to the great damage and irreparable injury of your orator and the public generally."

It was held that the plaintiff could not maintain the bill. The Court said:

> "The first ground of the demurrer urged by defendants is that the Attorney General is a necessary party to these proceedings, and a private individual may not maintain this form of action.
>
> * * * * * * * *
>
> "We think it is well settled in this state that grievances which afflict the community must be redressed by those to whom the law has intrusted the duty of interference. Such has been the rule of law in this state for many years. *Miller* v. *Grandy*, 13 Mich. 540. It was there held that private persons could not assume to themselves the right to institute proceedings in chancery to redress grievances on behalf of the public. They can only proceed where their individual grievances are distinct from those of the public at large, and such as give them a private right to redress. In that case Justice Campbell said: 'This bill can only be sustained by holding that every private citizen has the right to call public officers to ac-

count for their official misconduct, affecting the body politic, and not specially one man more than another. There were a few cases decided in the Supreme Court of New York, which recognized such a right; but they have been over-ruled repeatedly, and the doctrine is now well settled that a private taxpayer, suffering under no special grievance, is not even a proper party to a bill filed to restrain threatened misconduct. * * * And grievances which afflict the community must be redressed by those to whom the law has intrusted the duty of interference.'

"In *Steffes* v. *Moran*, 68 Mich. 291, 36 N. W. 76, it was held that public wrongs must, in this state, be redressed by the people's public agents, and not by private intervention; and that the case of *Miller* v. *Grandy*, *supra*, laid down the Michigan doctrine on this subject, with its reasons, and has been adhered to.

"In *Sweet* v. *Smith*, 153 Mich. 674, 117 N. W. 59, this court was asked to review an order of the circuit court for the county of Wayne denying a mandamus, prayed for by the relator and others, compelling the respondent 'to execute and enforce all the laws pertaining to the preservation of the Sabbath, or the first day of the week, at the baseball park of the Detroit Club.' The purpose of the proceeding was to prohibit Sunday baseball playing in the city of Detroit. In a per curiam opinion this court said: 'It does not appear that the grievance of the petitioners is any other than that sustained by other citizens of the city of Detroit. Neither does it appear that the Attorney General of the State has refused to take action in the matter. Under these circumstances, petitioners have no right to relief. The grievance

complained of is purely a public grievance, and redress should have been sought by the people's public agents, and not by private intervention. See *People ex rel Russell* v. *Inspector and Agent of State Prison*, 4 Mich. 187; *Miller* v. *Grandy*, 13 Mich. 540; *Peo. ex rel Delbridge* v. *Green*, 29 Mich. 121; *Peo. ex. rel McBride* v. *Board of Supervisors of Kent County*, 38 Mich. 422; *Steffes* v. *Moran*, 68 Mich. 291, 36 N. W. 76; *Smith* v. *City of Saginaw*, 81 Mich. 123, 45 N. W. 964. The decision of the Circuit Court was clearly correct, and we decline to review it in this court.'

"This subject was fully discussed and many cases cited in the recent case of *Harvester Company* v. *Circuit Judge*, 163 Mich. 55, at pages 66 and 67, 127 N. W. 695, 30 L. R. A. (N. S.) 580, Ann. Cas. 1912A, 1022. Under the provisions of Act 255, Public Acts of 1899, and the supplementary act of 1905, relating to trusts and monopolies, the Attorney General is directed to institute *quo warranto* proceedings, or proceedings by injunction or otherwise, in so far as a corporation is concerned, and no such right of action is given, as is claimed here.

"In our opinion this ground of the demurrer was well taken and should be sustained."

By parity of reasoning if in the instant case it be contended that the Interstate Commerce Commission has in granting its license to the New York Central exercised powers not given it by statute or powers vested in it in an unwarranted manner to the public injury the Attorney General is alone entitled to seek redress for such a public wrong.

If in answer to this, counsel for the plaintiff state that the bill does not set up a public injury, then it shows

no wrong whatever, for certainly the courts cannot be called upon to regulate the division of traffic among competitors.

The above authorities therefore establish that even assuming for sake of argument that the defendant railroad companies had exceeded their powers in consummating the transactions authorized by the order of the Commission of May 16th, 1922, the plaintiffs have no right upon the basis of principles of equity to maintain this bill.

Appellants' Citations:

Counsel under (b) of 1, (p. 19) of their argument cite certain authorities stated by them to establish a principle contrary to that announced in the foregoing cases. An analysis of the same will show that they are either irrelevant to the issue or are in harmony with the cases heretofore cited. They rely upon paragraph 20 of Section 1 of the Act, which provides that:

> "Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest;"

It should first be said that there is no corresponding provision applicable to paragraph (2) of Section 5. Aside from this, however, the above quoted provision obviously covers cases only where a carrier undertakes,

without making application to the Commission, under paragraphs (18) and (19), to construct, operate or abandon railroad property where a prerequisite to the right so to do requires the approval of the Commission. Paragraph (20) was not intended to cover a case where compliance was had in every respect with paragraphs (18) and (19), and the question raised is as to the jurisdiction of the Commission to issue a certificate of convenience and necessity.

The case relied upon by counsel applying paragraph (20) above referred to, namely, the *D. & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. Rep. 540, was one in which the carrier enjoined attempted to construct a branch track without the consent of the Commission upon the theory that it was a spur track excepted from the jurisdiction of the Commission under paragraph 22 of Section 1.

The cases of *Peavey & Company* v. *Union Pacific R. Co.*, 176 Fed. Rep. 409, *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, *Edward Hines, Yellow Pine Trustees et al.* v. *U. S.* No. 91 decided by this court on November 12, 1923, *Atlantic Coast Line R. Co.* v. *Interstate Commerce Commission*, 194 Fed. Rep. 449 and *McLean Lumber Company* v. *United States*, 237 Fed. Rep. 460, are cited and reviewed under previous Subdivision 4 of this brief.

The cases of *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443 and *American Steel Foundries* v. *Tri-City Central Trades Council, et al.*, 257 U. S. 184, are so-called Clayton Act cases passing upon the right of employers to have injunctive relief against combinations of employees who interfere with their business in violation

of the provisions of the Anti Trust Laws. These cases are obviously not in point, for they represent instances of proceedings in equity to restrain the commission of injuries which at common law were actionable and under our Anti Trust Laws have become so by statute.

Furthermore, note in this connection the proviso contained in Section 16 of the Clayton Act, 38 U. S. Stat. at L. 737 (Section giving any person, firm, corporation or association the right to sue for injunctive relief against threatened loss or damage by violation of Anti Trust Laws) providing:

> "That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

The case of *International Railway Co.* v. *Davidson*, 257 U. S. 506, held that not only the users of a toll bridge, but also the Bridge Company itself was vitally interested in an attempt by the Collector of customs to demand extra compensation for Custom officers employed at the American end of the toll bridge on Sundays or Holidays to examine baggage.

Counsel cite a series of cases holding that owners of special franchises (exclusive and non-exclusive instances) may enjoin invasion of the property rights represented by the same by parties engaging in rival activities with-

out sanction of or contrary to law. The chief of these cases is that of *Memphis Street Railway Co.* v. *Rapid Transit Company*, 179 Southwestern Reporter 635. In this case the Supreme Court of Tennessee held that the Memphis Street Railway Company had the right to enjoin, for the purpose of protecting its franchise to operate cars in the streets of Memphis, the Rapid Transit Company from operating jitney busses without an ordinance from the City as required by the laws of the State. The court held that the defendants were lawbreakers, subject to criminal prosecution, operating in direct violation of the statute of the State, and, furthermore, that they might be enjoined as constituting a nuisance interfering with the operation of the plaintiff's cars. Note, however, the distinction made in this case which harmonizes it with the Ellerman Case and other cases upon which we rely. The Court said:

> "nor could the validity of a license or franchise possessed by a competing defendant be questioned, and its exercise restrained, in proceedings of this character. *Geneva-Seneca Electric Co.* v. *Economic Power & Const. Co.*, 136 App. Div. 219, 120 N. Y. Supp. 926; *Coffeyville Min. & Gas Co.* v. *Citizens' Natural Gas & Min. Co.*, 55 Kan. 173, 40 Pac. 326; *Market St. Ry. Co.* v. *Pen. Ry. Co.*, 51 Cal. 583. We are in full accord with the views expressed in these and like cases. Questions upon the regularity of a charter the validity of a franchise, and the like, are to be determined upon suit of the Attorney General or other constituted authority, and *not on suit of a competing corporation.*" (Italics ours.)

In *Bartlesville Electric Light & Power Co.* v. *Bartlesville Interurban Railway Co.*, 29 L. R. A. (N. S.) 77 (109 Pac. 228) the same distinguishing factor exists, that is to say, the defendant without authority from the City was trespassing upon City streets in an attempt to erect poles and wires for electric light service, and in accordance with the statement of the court was guilty of a public nuisance which invaded the property rights of the plaintiff.

Referring to the earlier cases cited by counsel *Conway* v. *Taylor*, 66 U. S. 603 (decided 1861) involved the invasion of an exclusive franchise to operate a ferry across the Ohio River; the *Slaughter House Cases*, 16 Wallace 36, (decided 1872) involved the question of the constitutionality of granting an exclusive and monopolistic franchise to operate slaughter houses in the City of New Orleans; *Town of East Hartford* v. *Hartford Bridge Company*, 10 Howard 511, (decided 1850) involved the invasion of a Bridge Company franchise by the town in operating a ferry over the Connecticut River without legal authority; and *Raritan & Delaware Bay Railroad Co. et al.* v. *Delaware & Raritan Canal, et al.*, 18 N. J. Equity 546 (decided 1867) involved the invasion of a franchise given by the State of New Jersey to a railroad company, which made it unlawful before the first day of January, 1869, to construct any other railroad or railroads in the State of New Jersey without the consent of the said complainants (owners of the franchise) which should be used for the transportation of passengers or merchandise between the Cities of New York and Philadelphia, or to compete in business between said cities with the railroads of the complainants.

Therefore none of such cases is in point in the present discussion.

Furthermore, in the New Jersey case attention was called by the court to the fact that the defendants were not claiming a statutable right to set up a line of railroad to compete with the chartered rights of the complainants, and that, on the contrary, there is no pretense that the state has yielded her assent to any such competing enterprise. The court thereupon said:

> "The controversy in this case, therefore, is between the complainants and mere wrong-doers, and the question thence arises, has a railroad company any redress against a competition unwarranted by law, and which materially affects the value of the privileges with which it is legally vested? (p. 570) * * * A competing road, set up without a legislative license, is a fraud upon such grant (franchise) and is a plain public nuisance. The consequence is, that the case of the complainants, in my opinion, does not, necessarily, rest upon the express clause in their charter guaranteeing to them an exclusive privilege" (p. 572).

It thus appears that the same distinction was made in 1867 as that heretofore referred to made by the court in *Memphis Street Railway Company* v. *Rapid Transit Company.*

Brooklyn City Railroad Company v. *Whalen,* 191 Appellate Division 737 (New York) falls in the class of the Memphis Street Railway Company case, for in that case the City, without any pretense of power or authority of law, was undertaking to operate a stage line

running over the routes and paralleling the tracks of the Street Railway Company, thereby subjecting it to special injury and added obstruction in the operation of its cars under its franchise.

The cases of *People Ex rel., N. Y. C. & H. R. Co.* v. *Public Service Commission*, 195 New York 157, and *People Ex rel. N. Y. Edison Company* v. *Wilcox*, 207 New York 86, are not in point because in those cases the courts could be called upon to review in certain respects the Commission's certificate of convenience and necessity, their jurisdiction being invoked by virtue of a statutory writ of certiorari. In this respect it was said in the Wilcox case:

> "The commission might legally and justly permit it (the relator) to become a party to the proceeding and the determination adverse to it after its intervention was reviewable, under certiorari, upon its application as the party aggrieved thereby." (p. 95.)
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> * * * * * * *
>
> "In respect of any matter within the scope of the intervention, it became an actor, with liberty to present its contention and obtain an adjudication, and a consequent right to have whatever was done reviewed by the appellate courts." (p. 96.)

In the railroad case above referred to, the Court said:

> "It is also insisted by the appellant that the relator was not a party aggrieved by the action of the board of railroad commissioners. That was a question for the board and the Appellate Division to consider." (p. 166.)

It should be noted also that in the Whalen case above referred to the court called attention to the absence of a

certificate of convenience and necessity, and, upon any application for such certificate, to the legal right of the plaintiff to be heard.

In the instant case the plaintiffs make no charge that the New York Central has assumed control of the Junction properties without franchise or color of legal authority. Indeed the plaintiffs expressly concede by bringing their action under the provisions of Chapter 32 of the Urgent Deficiency Appropriations Act that they are seeking to try out the validity of the license issued to the New York Central pursuant to law, and, on the other hand, they make no claim of the invasion of the property rights of a special franchise. They appear only as competitors of the New York Central and in this capacity seek to initiate against it what amounts to a *quo warranto* proceeding. Every case referring to the subject cited in this brief and the brief for appellants follows the rule announced by this court in the Ellerman case that in such a question they have no interest and cannot be heard to complain.

II.

The provisions of the Commerce Court Act as applied to the District Courts could not constitutionally authorize such courts to review orders of the Interstate Commerce Commission except as may be so required to pronounce judgment in cases and controversies as provided in the constitution.

If it be contended by the plaintiffs that the proviso in Section 5 of the Commerce Court Act which authorizes

any party or parties in interest to the proceeding before the Commission in which an order or requirement is made to appear as parties of their own motion and as of right in any suit involving the validity of such order or requirement and the interest of such party is to be interpreted as permitting a suit in equity to be initiated by any party who appeared in the proceeding before the Commission without respect to seeking to prevent the invasion because of the order of the Commission of a right or interest entitled to protection at law or equity, such an interpretation would make the proviso of Section 5 unconstitutional. It would mean, in effect, authorizing a citizen who had disclosed before the Commission no possible invasion of his own legal rights or of rights of individuals, whom he was authorized to represent as agent, to institute a proceeding in court to test the validity of the order of the Commission as such and without respect to its application to a specific controversy. A proceeding thus brought would not be a judicial proceeding within the meaning of the Constitution of the United States to be adjudicated by the courts of the United States and would thus be beyond their powers to entertain. The interest of the party in the proceeding before the Commission must be of such a character as to identify him with a right cognizable at law or equity which the order of the Commission will invade, and for the protection of which the common or statute law has provided a remedy.

The case of *Muskrat* v. *United States*, 219 U. S. 346, involved the validity of an act of Congress authorizing David Muskrat and J. Henry Dick on their own behalf and on behalf of all Cherokee citizens to institute suits in the Court of Claims to determine the validity of cer-

tain acts of Congress which attempted to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands to the Cherokee citizens. A right of appeal from any decision of the Court of Claims was given to the Supreme Court of the United States.

Proceedings were begun in the Court of Claims based upon this statute and upon its decision an appeal was taken to this Court. This Court questioned whether the proceeding amounted to a case or controversy within the jurisdiction of the court to adjudicate because there appeared to be absent from it the claim of some specific right upon which the statutes, the validity of which was raised, reacted. The court first reviews the earlier decisions, discussing the division of the Government into three distinct and independent branches, of which the judicial branch was one and which held that administrative or advisory functions could not be constitutionally delegated to the United States Courts. It then proceeds to discuss what is meant by the judicial power conferred by the constitution upon the Supreme Court and with appropriate aid upon the inferior courts of the United States. In this respect it says:

> " 'Judicial power,' says Mr. Justice Miller in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' Miller on the Constitution, 314.
>
> As we have already seen by the express terms of the Constitution, the exercise of the Judicial power is limited to 'cases' and 'controversies'. Beyond this it does not extend, and unless it is

asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'? A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury* v. *Madison*, 1 Cranch, 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field, at the circuit, in the case of In re *Pacific Railway Commission*, 32 Fed. Rep. 241, 255. Of these terms that learned Justice said:

'The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall. 431, 432; 1 Tuck. Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom *for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.* Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose *contentions* are submitted to the court for adjudication.' "

The Court quotes from *Marbury* v. *Madison*, 1 Cranch, 137, in which case Chief Justice Marshall said "that power [the judicial] is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law." It calls attention to the fact that (*Cohens* v. *Virginia*, 6 Wheat. 264) Chief Justice Marshall said—

> "The article does not extend the judicial power to every violation of the Constitution which may possibly take place, *but to 'a case in law or equity' in which a right under such law is asserted in a court of justice.*"

The court quotes Mr. Justice Brewer's opinion in *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339, to the following effect:

> "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. *It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals.*"

In holding that the Supreme Court had no jurisdiction over the proceeding instituted the court said:

> "That judicial power, as we have seen, is the right to determine actual controversies arising be-

> tween adverse litigants, duly instituted in courts of proper jurisdiction."

and again

> "It is true the United States is made a defendant to this action, *but it has no interest adverse to the claimants.* The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question." (In foregoing quotations italics ours.)

The foregoing quotations make it clear that a party who seeks the adjudication of a Federal Court in respect of the application of a Federal statute or of an order of an administrative body, such as the Interstate Commerce Commission, to rights in general and not to rights specific, vested in him, and which he claims have been invaded, is not presenting to the court a case or controversy within its power to adjudicate.

The last case on this subject is *Keller et al.*, v. *Potomac Electric Power Company, et al.*, 261 U. S. 428, decided by this court, April 9th, 1923. This case involved the constitutional power of this court to review, pursuant to authority given it by act of Congress, the decisions of the Supreme Court of the District of Columbia ren-

dered in cases in equity upon issues of fact involving the valuation of the properties of public utility companies operating in the District of Columbia. The court held that such an inquisition did not involve a controversy over which it had jurisdiction within the meaning of the provisions of the Constitution. In this respect the court said:

> "Such legislative or administrative jurisdiction, it is well settled cannot be conferred on this Court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in *Muskrat* v. *United States*, 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court without real parties or a real case, or to administrative or legislative issues or controversies."

While this case is not analogous in its facts to the instant case the principle announced has application to a contention that a party who appeared in the proceeding before the Interstate Commerce Commission is thereby given a credential under Section 5 of the Commerce Court Act merely because of such appearance to begin a suit in

equity to set aside the order of the Interstate Commerce Commission without disclosing that the order when complied with has or will have a necessary reaction upon some right or interest either of the party or of some one for whom he is authorized to act which is entitled to protection in a court of law or equity.

The plaintiffs made no showing at the hearing before the Interstate Commerce Commission that any order that might be entered by it based upon the application of The New York Central Railroad Company would invade rights or interests peculiar to them for which they were entitled to demand protection in the courts. Upon this point being made by counsel for the applicant at the hearing before the representatives of the Commission the reply was made that any citizen had the right to appear before the Commission as an administrative body for the purpose of showing the needs of, and endeavoring to protect the public interest. Thereafter counsel for the intervening carriers made much of his position and that of his clients as appearing as citizens in the public interest. It is obvious, however, that neither he nor the plaintiffs can come to this court in any such capacity, for so to do would be to bring to it an issue identical in principle with that adjudicated in *Muskrat* v. *United States, supra,* to be not in fact a case or controversy within the jurisdiction of the Federal courts to consider.

III.

The allegations of the bill that the record made before the Commission upon which the said order is based contains no evidence that the present or future public convenience and necessity require or will require the consummation of the transactions authorized or that they will be in the public interest, are not sufficient to show that the Commission was without power to enter said order, or that it was otherwise invalid.

It should first be said that the allegations contained in Subdivision X of the bill, that the order contains no certificate of public convenience and necessity and no evidence in support thereof, may be ignored, as it is obvious from the form of the order of the Commission that it followed the requirements of paragraph (2) of Section 5 of the Interstate Commerce Act and not those of paragraph (18) of Section 1 of the same.

Paragraph (2) of Section 5 provides that:

> "Whenever the Commission is of opinion, after hearing, upon application * * * that the acquisition, to the extent indicated by the Commission, * * * will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

The report of the Commission follows both the spirit and letter of this paragraph in finding that subject to

the observance of certain conditions the acquisitions proposed "will be in the public interest."

The formal order likewise follows the requirements of the paragraph by approving and authorizing the acquisitions.

The bill and its exhibits taken together show that the averments to the effect that the record contains no evidence in support of the order must be given the meaning not that no evidence whatever exists to support the findings contained in the report of the Commission, upon which its formal order is based, but rather that the ultimate conclusions of the Commission are deduced from conflicting evidence. Each allegation in the bill stating that the record contains no evidence that the consummation of the proposed transaction will be in the public interest is followed by the statement:

> "but, on the contrary, the said record contains evidence, which clearly shows that the said acquisition of control is and will be directly contrary to the public interest and to a sound public policy."

Here is an obvious admission that evidentiary facts of some character pertinent to each issue were offered at the hearings although alleged to show conclusions contrary to those found by the Commission. Such statement must be read in conjunction with the averment made in Subdivision VII of the bill, that at the first hearing in the proceeding the plaintiffs intervened and were made parties thereto, and thereafter extensive public hearings were held, and in connection with the report of the Commission filed as an exhibit by the plaintiffs in behalf of

their own case summarizing the respective contentions of the parties and the evidence on the issues offered at the hearing.

Such report (Record 16) begins the review of the record by stating that it is voluminous and establishes the following facts. Thereafter is set forth in the most meticulous detail not a series of conclusions but an elaborately summarized statement of the evidence pertinent in the fullest degree to the points upon which the applicant relied for the support of its application. Thereafter the report summarizes the grounds specified in the application and the opposing contentions of the interveners, and comments upon the evidence in respect of such contentions; and after this full recital of evidentiary details it sets forth its several ultimate conclusions upon which it makes its finding that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest.

In the face of such a statement of facts a sweeping allegation that there is no evidence in the record to support the finding of public interest is not sufficiently definite to be good pleading. It can only mean that the plaintiffs do not agree with the conclusion reached by the Commission upon the evidentiary facts, a question of course that the courts cannot consider.

For the purposes of this argument we are entitled to take the plaintiffs' exhibits at their face value. It was their privilege to traverse in their bill the specific statements of the report summarizing the facts contained in the record. Their failure to do so, makes obvious that

their general allegations as to a want of evidence to support the findings means only that the weight of the evidence is against the findings. In the case of *Interstate Commerce Commission* v. *L. & N. Railroad*, 227 U. S. 88, this court, after analyzing the evidence contained in the record before the Commission, held that the Commerce Court was unwarranted in deciding that the order of the Commission was void because there was no material evidence to support it. This court in reversing the Commerce Court said:

> "The order of the Commission, restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict nor put their judgment against that of the rate-making body, and the decree is *Reversed.*"

However, beyond the above proposition is the further one that in the application of The New York Central Railroad Company the Railroad Company and the Commission were the only legally interested parties. The principle announced in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, *supra*, that an order will be void if a hearing was denied or if the finding was contrary to the indisputable character of the evidence, is, of course, only applicable in those cases in which the complaining party is entitled to be notified and heard. Though it be true that administrative boards and officers acting as agents of the Legislature, or in a quasi-judicial capacity, are not limited in

jurisdiction as to parties, and that all citizens without respect to their personal interests in the subject matters of investigation may appear before such bodies to offer evidence in the public interest; still only those parties whose legal rights will be affected by the order of the Commission are entitled to notice of the hearing (unless otherwise provided by statute) with the consequent right that any order affecting their interests shall not be arbitrarily made. The plaintiffs were not of this class, for they certainly would have had no standing in court to ask to have the permissive order of the Commission set aside, if it had been entered upon a hearing had without special notice to them and without their knowledge.

The case heretofore cited of *United States* v. *Merchants and Manufacturers Traffic Association*, 242 U. S. 178, is directly in point on the above proposition. The order of the Commission considered in that case was a permissive one authorizing the carrier to make certain rates excepted from the application of the long and short haul clause of the Fourth section of the Interstate Commerce Act. The proviso in this section reads:

> "That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property;"

The power here given to the Commission is of the same nature as that delegated to it under paragraph (2) of Section 5.

A number of hearings upon the application of the carriers had been held by the Commission in which many shippers participated. An elaborate supplementary report was made by it on January 29th, 1915, and another on April 30th, 1915. The propriety of modifications in addition to those proposed by the carriers was shown, and a new plan for constructing "back haul" rates developed by the Commission was eventually embodied in an Amended Fourth Section Order No. 124 of April 30th, 1915, and adopted by the carriers in the tariffs filed thereunder. Thereupon the Merchants & Manufacturers Traffic Association and others, representing the shippers of certain cities, conceiving themselves aggrieved by the refusal to grant them the same rates as certain ports, and alleging that they had participated in whole or in part at hearings which preceded the entry of the last amended order, applied to the Commission for a rehearing, and when their application was denied, brought suit in the District Court to restrain the enforcement of the amended order, averring that they had been denied their day in court and had not been given an opportunity to show the unreasonableness thereof.

It was averred that "the order of April 30, 1915, *was without evidence, that petitioners have been denied the equal protection of the law and deprived of property without due process of law, to their irreparable damage.*"

There thus appeared a case in which the Commission had given permissive authority to the carriers to readjust their rate structure resulting in affecting the interests of certain shippers. The particular case in which the order was made was disposed of without notice to such shippers. In the bill in equity filed by them to

enjoin the enforcement of the order it is averred that the same was without evidence, and furthermore, that the petitioners had been denied the equal protection of the law and deprived of their property without due process of law to their irreparable damage.

The case as thus stated is far stronger than that of the plaintiffs in the instant case, who make no similar claim to invasion of their constitutional rights.

The District Court, sitting with three judges, took jurisdiction and held "that an order authorizing higher rates to these interior cities could not legally be entered unless there was an 'application' to the Commission by the carriers for that specific purpose and 'a hearing upon that particular application as in a special case'; that there had been no such application and hearing and that consequently the orders were void and the tariffs filed in pursuance thereof illegal." (*Merchants & Manufacturers Traffic Association* v. *United States*, 231 Fed. Rep. 292).

Upon appeal to this Court the decision thus made was reversed. The Court held that "It may be doubted whether application by the carrier is a prerequisite to the granting of relief"; and of the relations of the petitioners to the hearing and of their right to complain it says:

> "Unless formal application be an indispensable prerequisite to the exercise by the Commission of the power granted by the Fourth Section, its absence or a defect in it could be waived; and it would be waived by the filing of tariffs under the order entered. For the order is permissive merely. The carrier is the only necessary party to the proceeding under §4. The Commission represents

> the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them."

The court further held that such parties "mistook their remedy" and that "To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission;". In other words a party who is not entitled to notice of a hearing certainly is not in a position to claim that any order based upon the same is void because of being arbitrary for any reason as, for instance, a want of evidence to support the same.

If the rates made by the tariffs filed under the authority granted seemed to the petitioners unreasonable, or unjustly discriminatory the Court said that the Interstate Commerce Act afforded ample remedy. So in the instant case, if the defendant companies operating the Junction properties discriminate against the plaintiffs, contrary to the provisions of the Interstate Commerce Act, such act affords them an adequate remedy. They may always appeal to the Commission for relief, and they are not entitled to seek to have the courts nullify its administrative authority as they are now attempting to do.

Another illustration of the situation of the parties in the instant case is found in comparing the status of carrier, shipper and Interstate Commerce Commission in their respective relations in the making and altering of rates.

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R., supra,* it is said:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order."

The prerogative to make the rate belongs, of course, in the first instance, to the carrier, for it is entitled to name the price of the transportation that it has for sale. It follows, that if in such case the Commission seeks to set the rate aside as being unreasonable its action will be arbitrary unless supported by evidence. In such case the carrier is the interested party whose property is being taken by the abrogation of the rate and the Commission represents the public.

If, however, the rates filed by the carrier are accepted and approved by the Commission the shipper could not take exception to the Commission's action in such case on the ground that it is not supported by evidence, for if he complain that his property is thereby being taken by the exaction of an unreasonably high rate the burden of proof is upon him to establish such proposition. This, in principle, was the exact ruling of the court in the instance of the Commission's permissive order relieving the carriers from the application of the provisions of the Fourth Section of the Act in the case of *United States* v. *Merchants and Manufacturers Traffic Association, supra.* If, in such case, a shipper cannot complain that a permissive order unsupported by

evidence is arbitrary, how much farther removed are the plaintiffs in the instant case from such a right, for they, unlike the shipper, made no claim in their day in court before the Commission, and they now make no claim before this court in their bill in equity that they will be denied the equal protection of the law or will be deprived of their property without due process of law.

It follows, therefore, that all of the averments in paragraphs (1) to (7), inclusive, of Subdivision X of the bill of complaint, relating to the want of certificates of convenience and necessity and the want of evidence to support the order and its findings, are, in view of the occasion of their assertion, without effect in showing that the order of the Commission is invalid.

IV.

The order of the Commission being a Legislative Act, permissive in character, its validity cannot be attacked upon the ground that it is not supported by evidence.

The principle developed in the previous Subdivison, as announced in the case of *United States* v. *Merchants and Manufacturers Traffic Association, supra.*, is apposite to the point here made. It is again offered for the purpose of showing its significance in another relationship.

The Judicial Department of the Government can interfere in the affairs of the Legislative or Executive Departments only when the officers or agents of the lat-

ter invade by their acts rights or interests which the Judicial Department is required to protect. It is for such reason that this court held in *I. C. C.* v. *L. & N. R. R., supra.*, that a finding of the Commission without evidence to support it is arbitrary, for, it is presupposed that upon the basis of the finding so made the Commission intends to make and enforce an arbitrary order. It follows that if the complexion of the Commission's activity be such that it cannot in and of itself be arbitrary in the sense of invading private rights or interests the reason for the court's statement disappears. Such will always be the case where the Commission acting as the legislative agent of Congress investigates and specifies instances in which privileges, licenses or grants extended by Congress shall have application.

Paragraph (2) of Section 5 and Section 20a of the Interstate Commerce Act (regulating the issue of securities) illustrate cases of such character. Under paragraph (2) all that is required is that the Commission shall be of opinion, after hearing, that the acquisition of control will be in the public interest. To such a hearing there can be no interested parties other than the applicant and the Commission, for the latter represents the public. All others that intervene must necessarily act as *amici curiae* in the interest of the public. The Commission could satisfy itself as to whether the acts for which authority was sought were in the public interest by an informal hearing. Evidence is usually required only in cases involving adverse parties. There being only one party to the proceeding for authority under paragraph (2) of Section 5 it would seem that it

was not necessary to present formal evidence. The requirement of a hearing is for the benefit of the applicant and is not equivalent to a requirement of presentation of evidence. Therefore, if the Commission act in such case its order cannot be attacked upon the ground of being arbitrary for want of evidence. Franchises, grants or licenses received from the government are not subject to attack because not supported by proof of their necessity.

A perfect illustration of the point is found in paragraph (6) of Section 20a of the Act, under which the Commission is given authority to regulate the issue of securities. Such paragraph reads:

> "Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such *representations* as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold *hearings, if it sees fit*, to enable it to determine its decision upon the application for authority." (Italics ours.)

It is to be noted from the foregoing that, while the State authorities are entitled to notice of the application and have the right to make before the Commission representations, the Commission is not required to hold hearings to enable it to determine its decision upon the application for authority.

In the case of *Miller* v. *United States,* 277 Fed. Rep. 98, Judge Hand speaking for three judges sitting as the District Court held that upon an application by a carrier for authority to issue securities under Section 20a the Commission need make only such investigation as it considers necessary. He said:

> "As for the alleged defect in the powers of the committees, it is irrelevant because the railway company's application is enough. *The investigation required of the Commission may* be informal. Whatever they think necessary, and no more."

The scope of the Commission's prerogative as above stated, is due to the fact that the Commission and Congress are one and the same in law in determining upon the occasion for the application of the Congressional enactment.

Until the development in this country of the application of statutes through the medium of public utility commissions the Legislature directly conferred the power or privilege upon the public utility after investigation through a legislative committee. Since, therefore, the Interstate Commerce Commission in granting a privilege conferred by Statute is acting only in a legislative capacity, there is no constitutional reason why the Commission if it acts within its delegated power should be required to base its action upon any thing more than would be required of the Legislature.

That which constitutes public interest or public convenience and necessity is a very elastic question. It is always to be deduced from a great variety of circumstances tangible and intangible. It is appropriate for

the Legislature to delegate to its agent the power to act for the Legislature in every such inquisition. To argue that the courts should review the conclusions of the legislative agent in such case is equivalent to insisting that the judiciary should take over the functions of the legisative branch of the Government. It goes without saying that this is beyond their power.

V.

The purchase by The New York Central Railroad Company of all of the capital stock of The Chicago River and Indiana Railroad Company and the leasing to such latter Company of the Railroad of The Chicago Junction Railway Company did not bring about a consolidation of either The New York Central Railroad Company and The Chicago River and Indiana Railroad Company, or of The Chicago River and Indiana Railroad Company and The Chicago Junction Railway Company, or of all three such Railroad Companies into a single system for ownership and operation. The Interstate Commerce Commission therefore had power under the provisions of paragraph (2) of Section 5 of the Interstate Commerce Act to approve and authorize the acquisition of control by The New York Central Railroad Company of said other Railroads by the means thus described.

The chief point made in the bill as developed in paragraphs 8, 9 and 10 of Subdivision X of the same is that the Commission was without authority by order to approve the acquisition of control by the New York Cen-

tral of the River Road and of the Junction Road by purchase of all of the capital stock of the River Road and by the leasing of the Junction properties to the River Road. This assertion is based upon the proposition that the Commission has not yet adopted a final plan under paragraphs (4) and (5) of Section 5 of the Interstate Commerce Act for consolidating the railway properties of the United States into a limited number of systems; that the acquisition of control by the Central in the manner above described will constitute the consolidation of the Central and the Junction into a single system for ownership and operation; that therefore the authority given by the Commission for this purpose is prematurely exercised, since consolidations to be authorized by the Commission must be in harmony with and in furtherance of the final plan of railroad consolidations to be announced by it under paragraph (5) of Section 5 of the Act.

Counsel in support of the above proposition argue (Point 8, a, brief p. 59) that the application filed with the Commission shows the purpose to make the Junction and River Road a part of the system known as the New York Central Lines, and they state in this respect that such railroads have been operated along with other carriers constituting the New York Central Lines under a common control and management as a single system. (Point 8, b.) They ignore, however, Condition 1 of the Report of the Commission, which reads: "The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located

in Chicago in order to preserve for the shipper the present direct access to the railroad officials." (Record 22.)

They also state in their brief, although there is no averment to such effect in the Bill that the Junction and River Roads were separate properties, separately owned, operated and managed. The bill (Record 3) and the return of the applicant to the questionnaire issued by the Interstate Commerce Commission (Record 101) and filed as an exhibit by the plaintiffs show that The Chicago Junction Railways and Union Stock Yards Company, a New Jersey Corporation, owned all the capital stock of the Junction Company and that such corporation and Richard Fitzgerald owned fifty per cent. each of the capital stock of the River Road, and that the applicant asked for authority from the Commission to enter into an agreement with The Chicago Junction Railways and Union Stock Yards Company to purchase all of the stock of the River Road and to cause a lease to be made to such latter company of the railroad properties of the Junction Company. It thus appears that the Junction and River Roads were at the time of the filing by the New York Central of its application with the Commission properties under a common control, which control was proposed to be transferred to the New York Central, but with the expectation, as eventually prescribed in the order of the Commission, that such commonly controlled properties should continue to be operated as a distinct entity.

1. INTERPRETATION OF PARAGRAPH (2) OF SECTION 5:

For convenient reference this paragraph is again quoted, viz:

> "(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

It is averred in paragraph 8 of Subdivision X of the bill that the Commission under paragraph (2) of Section 5 is authorized to approve the acquisition by one carrier of control of another carrier either under lease or by purchase of stock, only when such control does not involve the consolidation of such carriers into a single system for ownership and operation.

It is then averred that the acquisition by the Central of the control of the River Road by the purchase of the capital stock of the River Road and acquisition by the River Road of control of the Junction by lease of its properties will constitute a consolidation of the Central,

the River Road and the Junction into a single system for ownership and operation.

It is also averred in paragraph 9 of Subdivision X that the acquisition by the River Road of the Junction properties under a lease for ninety-nine years, renewable in perpetuity at the option of the lessee, constitutes a consolidation of the properties of the River Road and of the Junction into one corporation for ownership, management and operation.

The statement above made interpreting paragraph (2) of Section 5 is erroneous, for it adds by implication a proviso to the paragraph that would contradict the context. Counsel would read the paragraph as if it stated that the Commission shall have authority to authorize the acquisition of control under lease or by purchase of stock provided that where any such transaction shall amount to a consolidation the Commission shall have no such authority. To so interpret its language is to contradict its phraseology as actually written.

The Commission is given authority to approve and authorize acquisition "by one of such carriers of the control of any other such carrier or carriers either *under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation.*"

This language obviously classifies control by lease or by the purchase of stock in one category and the consolidation of carriers into a single system for ownership and operation in another category.

The language of the paragraph in this respect is not open to any suggestion of ambiguity, for the alternative phrase "or in any other manner not involving the con-

solidation" etc. following the specified instances of control by lease and control by purchase of stock is the declaration of a legislative intent that such instances shall in no case be regarded as amounting to a consolidation of properties into a single system for ownership and operation.

Counsel in their brief construe the paragraph by requiring the phrase "not involving the consolidation, etc." to limit the words "either under a lease or by the purchase of stock" as well as the words "in any other manner". To so construe the language would call for a comma after the word "manner" and would obviously make superfluous the recital of the specific instances of control by lease and by purchase of stock; that is to say, it would be sufficient under the forced construction thus given to the language of the paragraph if it read that the Commission may authorize acquisition "by one of such carriers of the control of any other such carrier or carriers * * * in any * * * manner not involving the consolidation of such carriers into a single system for ownership and operation." Why use the phrases "under a lease" or "by the purchase of stock" if they are not to be regarded as illustrating instances not involving a consolidation? All words of a statute are presumed to have significance and if possible none is to be regarded as superfluous.

2. Interpretation of the Term Consolidation as used in Paragraphs (4), (5), (6) and (7) of Section 5:

The interpretation that we give to paragraph (2) of Section 5 makes it harmonize with the term consolida-

tion as it is used subsequently in paragraphs (4), (5) and (6) of the Section, where reference is made to consolidation of properties into one corporation for the *ownership*, management, and operation of the properties theretofore in separate ownership, management, and operation.

In other words, the act uses the term consolidation in its true sense as known to the law and as distinguished from other forms of tenure as by lease or stock control.

Paragraph (6) defines very clearly what is meant by consolidation where it states that:

> "It shall be lawful for two or more carriers by railroad * * * to consolidate their properties or any part thereof, *into one corporation* for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation,".

One of the conditions is that the proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5), and paragraph (7) refers to the existing consolidation of four Express Companies into The American Railway Express Company. In that case the four companies had actually been consolidated by transferring their properties to a new corporation. Therefore when in paragraph (2) the Commission is given authority to approve a lease or the acquisition of stock or some other form of control "not involving the consolidation of such carriers into a single system for ownership and operation," the consolidation referred to is clearly the one thereafter mentioned in paragraph (6), namely, the wiping out of

the old corporations and the substituting therefor of a new consolidated corporation, or the merging of titles and franchises into a single ownership in one existing corporation. The *sine qua non* of the status so contemplated is a common tenure in fee for all of the properties vested in a single corporate title holder.

> "Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and where its meaning in one instance is clear this meaning will be attached to it elsewhere, unless it clearly appears from the whole statute that it was the intention of the legislature to use it in a different sense" (36 Cyc. 1132).

It thus clearly appears from the statute itself that in order to effect a "consolidation", as the word is used in the statute, a *single corporation* must be created or exist which shall *own* as well as operate all the property.

This use of the word "consolidation" is in accordance with its well established meaning.

In Thompson on Corporations, Second Edition, Volume 5, Section 6035, it is said:

> "Consolidation takes place where two or more existing corporations are consolidated into a single corporation, and the existence of the uniting corporations is terminated and the consolidated company succeeds in a general way to the rights and franchises and acquires the property and assumes the obligations and liabilities of all the constituent companies. In the ordinary legal phraseology the term 'consolidation' is generally used to indicate both the act and the result of uniting two or more corporations into one."

In Sections 6036 and 6037 in the same work attention is called to the distinction between an amalgamation and a consolidation and between a merger and a consolidation.

In Section 6040, it is said:

> "*What constitutes consolidation.*—Consolidation is the union or combination of the stock, property or franchises of two or more corporations and by which the property, franchises and privileges of one or of all, become the property, rights and franchises of a single corporation, and by which the conduct of the corporate enterprise of all the constituent corporations are placed under one management. 'When the rights, *franchises*, and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law, and according to common understanding a consolidation of such companies.' 'There seems to be a great confusion as to the differences between consolidation and merger and sale. Rightly understood, there never can be a consolidation of corporations, except where all the constituent companies cease to exist as separate corporations, and a new corporation, to wit, the consolidated corporation, comes into being.' Generally the effect of consolidation in strict legal parlance is that the consolidating corporations are dissolved and cease to exist, except, perhaps, for certain purposes, and a new and distinct corporation is created by the consolidation, with the combined rights, franchises, privileges and property of all the consolidating corporations."

To the same effect, see also—

14-A *Corpus Juris*, 1054.

Fletcher, Cyclopedia Corporations, Vol. 7, Sec. 4661.

In *Louisville, &c. Railroad Co.* v. *Louisville Trust Co.*, 174 U. S. 552, this Court held that an acquisition by one railroad company of three-fourths of the stock of another is not a consolidation within the meaning of a statute of Indiana authorizing one railroad company to consolidate with another. See page 568 of the opinion.

In *Mills* v. *Central Railroad Company*, 2 Atl. (N. J.) 453, the Chancellor said in the course of his opinion (p. 456):

> "But I am of the opinion that power to consolidate does not involve authority to lease, and that it does not enlarge the power to convey lands, etc., conferred by the charter. Power to consolidate is power to take in a partner, or to go in as a partner, while power to lease is power to dispose of the whole concern to a stranger. In a consolidation the stockholders of the respective companies still retain, to a certain extent, control of their corporate property; but by a lease the stockholders of the leasing company part with the control of their corporate property, and hand it over to others and abandon their enterprise."

So in *Archer* v. *Terre Haute, etc. R. Co.*, 102 Ill. 493, where the question was whether a certain agreement between two roads constituted a consolidation, the Supreme Court of Illinois said (p. 503):

> "The agreement of February 10, 1868, was not for the consolidation of the roads of the companies

signing it. Both corporations retained their separate existence, and it does not appear it was ever contemplated the two roads should be merged into one, and both corporations pass to one management. The very terms of the agreement are inconsistent with the idea of consolidation."

There is an elaborate discussion of this question by Judge Hunt, now United States Circuit Judge, when a member of the Supreme Court of Montana in *State* v. *Montana Ry.*, 45 L. R. A. 271, 53 Pac. 623, in which with copious citations of authorities he points out the difference between a lease and a consolidation.

An instructive case is that of *Gere* v. *New York Central & Hudson River Railroad Company*, 19 Abb. N. C. 193. Certain stockholders of the New York Central brought an action against that corporation and the New York, West Shore & Buffalo Railroad Company to restrain the consummation of a lease between such railroad companies. The New York, West Shore & Buffalo was a competing road in all respects for its entire length. It attempted to lease its road, property and franchises to the New York Central for a term of 475 years. The statute of New York authorized any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter gave the use of the leased railroad in such manner as might be prescribed in the contract. The statute then contained these words:

"But nothing in this act contained shall authorize the road of any railroad corporation to be used by any other railroad corporation in a manner inconsistent with the provisions of the charter

> of the corporation whose railroad is to be used under such contract."

By Laws 1869, chap. 917, paragraph 9, railroad corporations were also authorized to consolidate and merge their capital stock, franchises, and property with the capital stock, franchises, and property of any other railroad, and it was further provided that:

> "no companies or corporations of this state whose railroads run on parallel or competing lines shall be authorized by this act to merge or consolidate."

The court first disposed of the question of power to lease by holding that it existed under the statutes referred to, and then discussed the prohibitory section above quoted in the following language:

> "The leasing of one railroad by another, whether for a longer or shorter period, is not a merger or consolidation. The term 'lease' implies the continued existence of the corporation, the lessor, with all its powers and functions, and all the rights incident to its creation; and it would be a gross misapplication of terms to hold that a leasing or contract for use by one railroad to another is a merger or consolidation of the two roads."

The Court therefore held that the proposed lease was not inhibited because of the statutory provision against consolidation.

Counsel in arguing, as they do in point (d) of 8 of their brief, (page 69) that "Consolidation is any form of union or combination whereby a single control is exercised over properties, each of which was theretofore sub-

ject to different control" fly in the face of paragraph (2) of Section 5, for its very purpose is addressed to making possible with the authority of the Commission acquisition by one carrier of control of another; and their own quotations conspicuously repudiate their point.

Thus they quote as apposite to their argument a large portion of the opinion of the Commission in the case entitled "*In the Matter of the Application of Pittsburgh & West Virginia Railway Company*", 70 I. C. C. 682 (decided December 10th, 1921), but they have failed to explain that the application to the Commission in this case was made under Section 20a for authority to issue the capital stock of the applicant to be used to acquire the stock of another railroad company in a plan to merge such other railroad company with the railroad of the applicant by the purchase of all of the former's franchises, corporate properties, rights and credits, and upon the understanding that the corporate existence of the merged railroad should be terminated.

This was obviously an instance of a form of consolidation controlled by the provisions of paragraphs (4), (5) and (6) of Section 5. The applicant carrier had invoked the jurisdiction of the Commission only under Section 20a to issue shares of stock, and the Commission denied the application because no authority had been sought from it to merge or consolidate the properties of the other carrier with those of the applicant. The opinion of the Commission was addressed not to an interpretation of the nature of the proposed acquisition, but to deciding that whatever its character there was necessity for obtaining the Commission's approval of the same. The Commission said that the meaning of the

word "consolidate" as used in paragraph (6) was of no immediate importance in its application to the subject matter of the case before them,—

> "for if the proposed purchase falls outside the terms of paragraph (6), it is certainly covered by paragraph (2) which deals with the acquisition by one carrier of the control of another 'either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation.' The question has a prospective importance, however, if we decide that authorization of the purchase is necessary under section 5, for no such authority may be granted under paragraph (6) until we have adopted a plan of consolidation under paragraphs (4) and (5), *while there is no similar limitation upon action under paragraph* (2)." (Italics ours.)

In other words the essence of the Commission's jurisdiction under paragraph (2) (under which it has immediate plenary powers of action) irrespective of the adoption by it of any plan of consolidation under paragraphs (4) and (5), is to authorize the unification of carriers under a form of control.

Again in the same case the Commission in insisting upon its jurisdiction over every form of proposed combination of carriers said:

> "Nor is the language of section 5 inconsistent with this conclusion. In *Lewis's Sutherland on Statutory Construction* it is said, at pages 1149-1150:
>
> > A direction contained in a statute, though couched in merely permissive language, will

> not be construed as leaving compliance optional, when the good sense of the entire enactment requires its provisions to be deemed compulsory.

But it is unnecessary to rely upon this principle of construction, for when, in paragraph (6), it is provided that 'it shall be lawful' to consolidate under certain conditions, this is but another way of saying that consolidations in disregard of those conditions shall be unlawful. *And in like manner, when it is provided in paragraph (2) that we may authorize the acquisition by one carrier of control of another in any manner falling short of consolidation, whenever we are of opinion that such acquisition 'will be in the public interest,' this is equivalent to saying that authority for the acquisition shall not exist under other conditions.*" (Italics ours.)

From the foregoing it would appear that counsel by means of their point (d) of 8, (Brief, p. 69) have endeavored to argue paragraph (2) of Section 5 entirely out of the statute.

3. Inconsistencies between Paragraph (2) of Section 5 and the remaining Paragraphs of the Section arising from the interpretation given to Paragraph (2) by Counsel for the Plaintiffs:

Reading paragraph (2) in connection with paragraphs (4) to (6) of Section 5 as amended, it is a proper inference that Congress intended to deal with all combinations of carriers, and did so by dividing them into two all-embracing classes, (a) combinations less than

consolidations, covered by paragraph (2), and (b) combinations constituting consolidations to be dealt with by paragraphs (4), (5) and (6). If different meanings be given to the term consolidation, the classification is not complete. There would be control by lease and/or purchase of stock which would be excluded from paragraph (2) and not included in paragraphs (4) to (6), for such paragraphs are obviously limited to consolidations effecting a unification of corporate franchises "into one corporation for * * * ownership". Furthermore if paragraph (2) is to be interpreted as recognizing some instances of control by lease or control by the purchase of stock, which would amount to a consolidation, great confusion would result in its application. The Commission would be confronted in each case with the question, does this lease and/or purchase of stock give the carrier a control over the other carrier, and, if so, does it amount to a consolidation? Thus there would develop in every instance a mixed question of law and fact for the Commission to pass upon with no guide other than as usually happens in all such problems the reactions of the Commission upon each specific set of facts. It is incredible to believe that Congress intended to create such an indefinite and vague situation.

The interpretation of counsel pushed to its logical conclusion would seem to result in making every lease and purchase of stock which gave one carrier a control over another amount to a consolidation, and hence be beyond the scope of paragraph (2); for every lease and purchase of stock which does not amount to a control is without the terms of paragraph (2). Hence there would be nothing left of the paragraph. This statement may be further demonstrated as follows:

To bring an application within the jurisdiction of the Commission the lease must cover all the lessor's property, for a lease of a part of the property will not give the lessee corporation control over the lessor corporation. And by parity of reasoning the stock to be acquired must be of an amount sufficient to confer control over the corporate activities of the other carrier. Application for an acquisition of control by lease or purchase of stock is not likely ever to be made except for the purpose of uniting the two carriers for operation as an entity or as operating parts of a single system. But according to the contention we are combating, this amounts to a consolidation. Hence when we have the "control" necessary to give the Commission jurisdiction, we will have a "consolidation" that will defeat the jurisdiction.

If counsel propose to save paragraph (2) of Section 5 for any purpose they have carefully refrained from giving any illustration under their theory of its interpretation falling within its terms. Their studied silence in this respect is argument most eloquent in evidence of the fallacy of their position.

Again, if operation in a single system by any form of tenure becomes the measure of consolidation, then the word "ownership" becomes superfluous as used in paragraph (2) and, also, in the phrase in paragraph (6) of the Section reading "into one corporation for the *ownership*, management, and operation of the properties theretofore in *separate ownership*, management, and operation," for in every instance of a lease of railroad property it invariably follows that the leased railroad is

united with the property of the lessee railroad for purposes of operation.

Counsel say "We find it impossible to harmonize the action of the Commission in the report and order here under attack with action which it has taken in other cases where applications were made under paragraph (2) of Section 5" (brief, p. 80).

The point so made is certainly well taken, for they will continue to find this want of harmony as long as they choose to ignore the intended significance of the word "ownership" above referred to as used in paragraph (2) in describing an attribute of the form of consolidation excepted from the provisions of such paragraph and as used in paragraph (6) in describing the form of consolidation controlled by its provisions, and as long as they insist in classifying every form of unified control of railroad properties without regard to whether it be accomplished by one carrier purchasing the stock or taking a lease of the properties of another carrier as outside of the provisions of paragraph (2).

Let us again use Counsel's own quotations to illustrate the fallacy of their position. They cite as apposite to their argument the case entitled "*Merger of Subsidiary Companies with Boston & Maine*", 76 I. C. C. 797. Here also they failed to explain that the applicant railroad company sought to merge into its corporation certain of its subsidiary companies by the acquisition and retirement of their respective capital stocks and the cancellation of their franchises, thus uniting "into one corporation for the *ownership*, management, and operation of the properties theretofore in separate ownership, management, and operation".

The Commission in such case well said:

> "The contemplated mergers would involve the consolidation of the applicant and the subsidiary companies into a single system for *ownership and operation* and, therefore, we are without jurisdiction under that paragraph to approve or authorize the same."

Upon the basis of this conclusion it said that if the application be treated as having been filed under paragraph (2) of Section 5 the Commission was without jurisdiction under that paragraph to approve and authorize the same, and if the application be considered as having been presented under paragraph (6) of said Section 5 the Commission could not entertain it at the present time.

Counsel have likewise misconceived the issue in the case from which they quote at length entitled "*In the Matter of the Application of the Western Pacific Railway Company for Authority to Acquire Control of the Sacramento Northern Railroad and to Purchase its Bonds*", 71 I. C. C. 653 (Rehearing July 2nd, 1923). Counsel quote in support of their position from a discussion of the Commission in this case as to whether the acquisition of all the capital stock of the Sacramento Northern by the Western Pacific would make the former an instrumentality of the latter and incorporate it, although separately operated, into its system, as if the Commission were to determine by the decision of this question whether it would have jurisdiction under paragraph (2) of Section 5 to authorize the Western Pacific so to acquire such stock.

So far from such being the case the Commission's conclusions upon the above subject have a significance as applied to the instant case directly contrary to that which counsel would attribute to them. The Western Pacific sought authority to acquire control of the Sacramento Northern *Railroad* by the purchase of all of the capital stock of the Sacramento Northern *Railway* Company, which in turn proposed to purchase the properties of and operate the Northern *Railroad*. It was urged against the application that until the *Railway* Company had applied to the Interstate Commerce Commission under Section 20a of the Act for authority to issue its own shares it would not be appropriate for the Commission to determine whether the Western Pacific should be given permission to acquire such shares. To this proposition it was answered by the Western Pacific that the Northern *Railroad*, which the Northern *Railway* Company proposed to purchase and operate, was an electric line not subject to the control of the Commission under the provisions of Section 20a of the Interstate Commerce Act respecting the issue of its securities.

The opinion of the Commission was addressed to demonstrating the contrary by showing that not only was the Sacramento Northern as independently operated a railroad of the character falling within the scope of the provisions of Section 20a, but that aside from this fact, upon acquisition of the control of the same by the Western Pacific under the provisions of paragraph (2) of Section 5 it would be undoubtedly so subject to the said Section "for it will be operated as part of the Western Pacific System, which is a general steam railroad system of transportation within the meaning of the Act".

In other words the Commission was taking for granted that the provisions of paragraph (2) of Section 5 covered a case of the uniting of railroads into a single operation system by means of stock control, for upon this assumption was based in part its conclusion that "the stock proposed to be acquired by the applicant would have no validity without (its) authority". That it was perfectly willing to take jurisdiction at the appropriate time of the application having for its object the uniting of the controlling and controlled carriers into a single system is apparent from the concluding statement of the opinion, reading:

> "The application will be denied without prejudice to its renewal later if the new Sacramento Northern Company should apply to us for authority to issue its securities and to assume the liability proposed."

Exactly consonant with this view is what the Commission said in the case of *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508, also quoted by counsel.

> "It is not enough to constitute such a consolidation" (that is a type of control excepted from paragraph (2) of Section 5) "that the carriers or their properties be consolidated into a single system for operation, or for management, or for management and operation, but it must also appear that they are consolidated for ownership."

Counsel rely upon *East St. Louis Connecting Railway Company, et al.* v. *Jarvis*, 95 Fed. Rep. 735, decided by the Circuit Court of Appeals for the 7th Circuit, holding that a ten year lease by one railroad company of a paral-

lel and competing line amounted to a consolidation within the meaning of the constitutional provision of the State of Illinois prohibiting a railroad corporation from consolidating its stock, property or franchise with another railroad corporation owning a parallel or competing line; also upon the case of *L. & N. Railroad Co.* v. *Kentucky*, 161 U. S. 677, in which this court affirmed an opinion of the Court of Appeals of Kentucky holding unlawful because of a similar Kentucky constitutional provision a consolidation effected by the Louisville & Nashville between its line and certain other railroad lines in Kentucky through the purchase of the capital stock as well as the physical properties of such other lines.

The above mentioned cases are obviously not in point as the constitutional provisions intended to prohibit the unification of parallel and competing properties in any form for common operation; to make possible which situation under certain circumstances is, on the contrary, the very office of paragraph (2) of Section 5.

With like irrelevancy counsel cite and quote from *United States* v. *Southern Pacific*, 259 U. S. 214 and *Northern Securities Case*, 193 U. S. 197, having to do with the existence of combinations prohibited by the Sherman Anti-Trust Law.

Congress has given express recognition to the fact that under paragraph (2) of Section 5 the control therein authorized by one carrier of another could include not only system combinations but system combinations of parallel and competing lines denounced as unlawful under State or Federal Anti-Trust Laws, for paragraph (8) of Section 5 reads as follows:

> "The carriers affected by any order made under the foregoing provisions of this section" (and this includes paragraph (2)) "and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the 'anti-trust laws,' as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

The foregoing expression of Congressional intent in and of itself is a complete answer to the whole of counsel's argument that "any form of union or combination whereby a single control is exercised over properties, each of which was theretofore subject to different control" is beyond the power of the Commission to sanction under paragraph (2).

The Interstate Commerce Commission and the Circuit Court of Appeals for the Eighth Circuit have passed upon this very question in the recent hearings before the Commission and that Court involving the application of the Southern Pacific Company to acquire control of the Central Pacific.

This court had held that the control by the Southern Pacific of the Central Pacific was in restraint of competition and in violation of the Sherman Anti-Trust Act as the law existed prior to the enactment of the Transportation Act (*United States* v. *Southern Pacific Com-*

pany, 259 U. S. 214) and had directed that a decree be entered severing the control by the Southern Pacific by stock ownership or by lease. Pursuant thereto a mandate was issued on October 17th, 1922 to the Circuit Court of Appeals for the Eighth Judicial Circuit directing that further proceedings be had in the cause in conformity with the opinion and decree of this court. The decision of the court as above stated was based upon the law as it existed prior to the enactment of the Transportation Act, 1920. On October 17th, 1922, the Southern Pacific Company filed an application with the Interstate Commerce Commission under paragraph (2) of Section 5 of the Interstate Commerce Act as amended by the Transportation Act, 1920, for authority to acquire control of the Central Pacific Railroad Company by lease and by ownership of all of its issued and outstanding capital stock. The Commission in its report authorizing the making of a lease in such case said:

> "The question has been raised as to whether an acquisition of control under the circumstances proposed amounts to a consolidation of the carriers concerned 'into a single system for ownership and operation,' as to which type of control we have no jurisdiction under paragraph (2) of Section 5. We have given consideration to the question and find that an acquisition of control consummated as proposed and exercised subject to the conditions to be imposed by our order herein, does not involve the consolidation of such carriers *into a single system for ownership* and operation. It is not enough to constitute such a consolidation that the carriers or their properties be consolidated into a single system for operation, or

> for management, or for management and operation, but it must also appear that they are consolidated *for ownership*. Since each of the carriers will retain its corporate identity and the legal title to its property, no consolidation of the kind defined by the statute will result" (76 I. C. C. 508). (Italics ours.)

The order of the Commission based upon its report provided, among other things, as follows:

> "It is ordered that acquisition by the Southern Pacific Company of control of the Central Pacific Railway by ownership of the capital stock of the Central Pacific Railway Company and under and in accordance with the terms of the proposed lease, as described in the application and report aforesaid be, and the same is hereby, approved and authorized."

After the entry of the order of the Commission the Government moved in the Circuit Court of Appeals that a final decree be entered in the case based upon the mandate issued from this Court. On June 18th, 1923, the Circuit Court of Appeals, after a full hearing, rendered a decision holding that the Interstate Commerce Commission had the authority to authorize and approve the control by lease and stock ownership of the Central Pacific Railroad by the Southern Pacific Company, and pursuant thereto it entered its decree reading in part as follows:

> PART 1. "4. The Transportation Act, 1920, conferred upon the Interstate Commerce Commission jurisdiction to entertain said application of the Southern Pacific Company and to make the aforesaid order of approval and authorization."

PART II. "2. The control of the Central Pacific Railway Company by the Southern Pacific Company through the said new lease approved and authorized by the Commission and through the ownership of stock, also authorized, is a lawful control. The prior unlawful control with which the mandatory requirements of the decision of the Supreme Court were intended to deal has now been succeeded by a situation and relation between the two railways which is lawful, and the executory and directory provisions of said mandate have thus been satisfied or rendered inoperative." (*United States* v. *Southern Pacific Company*, 290 Federal Reporter 443).

It thus appears that the Circuit Court of Appeals for the Eighth District has decided squarely against the interpretation given by the plaintiffs in the instant case to paragraph (2) of Section 5.

It is to be noted in the instant case that the stock control acquired by the Central over the River Road did not even result in producing between them a single operating entity, for Condition 1 of the Commission's report reads:

> "The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials" (Record 22).

The practical construction by the Interstate Commerce Commission of these clauses as above expressed in the Southern Pacific case and in other cases is entitled to great weight.

In *La Roque* v. *U. S.*, 239 U. S. 64, this court said:

> "Whether the Nelson Act contemplated that allotments should be made on behalf of Indians otherwise entitled thereto but who should die without selecting or receiving them is the principal question for decision. The regulations and decisions of the Secretary of the Interior, under whose supervision the act was to be administered, show that it was construed by that officer as confining the right of selection to living Indians and that he so instructed the alloting officers. While not conclusive, this construction given to the act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings & Dakota R. R.* v. *Whitney*, 132 U. S. 357; *United States* v. *Hammers*, 221 U. S. 220, 225, 228; *Logan* v. *Davis*, 233 U. S. 613, 627."

There is a large number of cases in which this rule of practical construction is considered, cited in Rose's Notes under *United States* v. *Moore*, 95 U. S. 760.

The statute has been uniformly construed by the Interstate Commerce Commission in harmony with our contention.

In *Lease of Valley Terminal Railway Co.*, Finance Docket No. 1, 65 I. C. C. 105, the Commission clearly defined what is meant by "consolidation" as follows:

> "It seems evident that Congress had in mind a complete scheme of regulation of contracts or other arrangements whereby one common carrier subject to the Act might secure control of another such carrier, *either by consolidation into one cor-*

> *poration*, or in some manner not involving such consolidation, or whereby they might enter into an agreement for the pooling of freight or earnings with a competing railroad." (Italics ours.)

Likewise in *Control of Big Four by New York Central*, Finance Docket No. 2046, 72 I. C. C., 96, 98 the Commission said:

> "While the acquisition by one carrier of the capital of another carrier may constitute, in many cases, a step toward consolidation, we are not convinced that such a step may not be taken in advance of the adoption of our consolidation plan pursuant to paragraphs (4) and (5) of Section 5. Paragraph (2) of that section authorizes us to approve the acquisition of control in any manner 'not involving the consolidation of such carriers into a single system for ownership and operation.' It is clear that ownership by the applicant of all of the outstanding stock of the Big Four will not in any sense work such a consolidation. It was the undoubted purpose of paragraph (2) to permit transactions short of actual consolidation to be consummated without reference to the consolidation plan provided for in paragraphs (4), (5) and (6). So much is clearly indicated by the language above quoted."

In numerous cases where one carrier already owned or was acquiring all or substantially all the capital stock of a second carrier, the Commission has held that the additional acquisition of a lease from the second carrier did not effect a "consolidation" but might be permitted as an "acquisition of control" under paragraph (2) of Section 5.

Control of	*Length of Lease—Years.*
Valley Terminal Railway Company, 65 I. C. C., 105	2
Valley Terminal Railway Company, 76 I. C. C., 147	50
Chicago, Terre Haute & S. E. R. R. Co., 70 I. C. C., 20	999
New York, Philadelphia & Norfolk R. R. Co., 70 I. C. C., 299	999
Cumberland Valley & Martinsburg R. R., 70 I. C. C., 301	999
Perth Amboy & Woodbridge R. R. Co., 70 I. C. C., 303	949½
New York Bay Railroad Company, 70 I. C. C., 306	949½
California Southern R. R. Co., 70 I. C. C., 514	10
Chesapeake & Ohio Railway Co. of Indiana, 70 I. C. C., 694	999
Arizona & New Mexico Ry. Co., 70 I. C. C., 795	1 (and until notice of termination)
Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co. (Panhandle), 72 I. C. C., 128	999
Eldorado & Santa Fe Ry. Co., 72 I C. C., 229	9 Yrs. 11 Mos.
Toledo & Ohio Central Ry. Co. Kanawha & West Virginia R. R. Co. Zanesville & Western Ry. Co.	72 I. C. C., 243 — Corporate existence of lessor and renewals.

Control of	*Length of Lease—Years.*
Grand Rapids & Indiana Ry. Co., 72 I. C. C., 260	999
Virginian & Western Ry. Co., 72 I. C. C., 454	999
Wheeling Terminal Ry. Co. and others, 72 I. C. C., 674	999
Chicago, Memphis & Gulf Ry. Co., 76 I. C. C., 637	40
Chicago, St. Louis & New Orleans Ry., 76 I. C. C., 294	99
New York, Lake Erie & Western C. & R. R. Co., 71 I. C. C., 541	20
Rio Grande, El Paso & Sante Fe R. R., Finance Docket 2804, decided April 4, 1923	10
Control of Black Mountain R. R., Finance Docket 2852, decided May 5, 1923	Until terminated on notice.
Control of Dodge City & Cimarron Valley Ry., Finance Docket 2870, decided May 16, 1923	10 (and until terminated by notice).

In the following cases, a carrier which already owned a lease of a second carrier, was permitted to acquire either control in the first instance or further control of the capital stock of said second carrier, under Paragraph (2) of Section 5:

Evansville, Indianapolis & Terre Haute Ry. Co., 67 I. C. C., 513	3
Pittsburgh, Fort Wayne & Chicago Ry. Co., 67 I. C. C., 752	999

As appears from the foregoing discussion the Commission's construction of the statute is one that gives

to the word "consolidation" its ordinary legal significance, follows the rule that the same word is to be regarded as having been used in the same sense throughout the particular sections of the statute under review, and conforms to the general context.

The construction which has been placed upon the act by the body charged with its practical administration is also necessary in order to give it practical effect. It is a matter of common knowledge, and thus within the knowledge of Congress, that the most usual means of bringing about a unification of corporate interests short of an actual consolidation is through lease and stock ownership. We have cited in this section of the brief 24 cases in which, through the exercise of the Commission's jurisdiction under paragraph (2), control of one carrier by another through the combined means of lease and stock ownership has been perfected. In one other case *Control of Lake Erie & Western by Nickel Plate*, 72 I. C. C., 459, control by a somewhat novel and unusual form of operating agreement, but having substantially the same effect upon operation as would a lease, was authorized. We know of no other case where control authorized under this section and since its passage has been brought about except by lease, stock ownership, or both combined. It is manifest on its face that to withdraw from the jurisdiction of the Commission under paragraph (2) cases where the control sought is to be brought about by lease and stock ownership would be to render impossible that unification of common carrier properties short of an actual technical consolidation, which it seems to have been the evident purpose of Congress to authorize.

As stated in *LaRoque* v. *United States, supra,* a construction given to an act in the course of its actual execution by the administrative authorities charged therewith, while not conclusive, "is entitled to great respect and ought not to be overruled without cogent and persuasive reasons." It is respectfully submitted that there is an utter lack of cogent and persuasive reasons for the contention that the Commission has in this case, by its construction of the statute, usurped a jurisdiction not conferred. On the other hand, the construction given to the act by the Commission is supported by every canon of statutory construction and is consistent with the evident purpose of the statute.

In support of the statement made in the last sentence of the preceding paragraph we call attention to the two main objects to be accomplished by the paragraphs of the Transportation Act now under consideration. The plan of consolidation is essentially connected with the new statutory rule of rate-making prescribed in Section 15a, paragraph (2) of the Interstate Commerce Act, as amended by the Transportation Act. That scheme was to make rates for large territorial groups of railroads on such a level that with honest and efficient management the result for the territorial group would be an operating income yielding a certain per cent. of return on the aggregate value of the railroad properties in the group. By consolidating the railroad system in each of these large territorial groups into two or more enlarged systems of fairly equal earning power and financial strength Congress expected that under uniform rates substantially the same rate of return would be earned. Another purpose was to have the capitalization of each of the large

corporations resulting from the consolidation, the aggregate of its stocks and bonds, correspond to the valuation of its properties by the Federal Board of Valuation. Congress was evidently aiming at a solution of the railroad problem which would be stable and permanent. Now neither stability and permanence nor the desired relation between capitalization and valuation will be accomplished if consolidation is brought about by way of lease and/or stock ownership, because such method of consolidation avoids any recapitalization and is terminable at will by cancellation of lease or sale of stock.

In conclusion it should be said that it is not for the courts to take exception to an express legislative distinction segregating instances of acquisition by one carrier of the control of another carrier by lease without limitation as to the term of the lease, and/or by purchase of stock without limitation as to the amount of stock to be acquired, from instances representing the unification of the properties of two carriers in a form involving the consolidation of such carriers into a single system for ownership and operation.

With such legislative distinction it is not within the power of the courts to inquire whether a lease for 99 years and thereafter at the option of the lessee in perpetuity, or whether the purchase by one carrier of 100% of the capital stock of another carrier results in so-called practical consolidation.

There is a clear distinction in law between merging properties in a single tenure, as by uniting them in fee under one corporate franchise and bringing them together under the control of a single individual or corporation by a twofold tenure in which the holding of one

segment is distinct from that of the other segment; and as heretofore shown the foregoing is not only a theoretical distinction but also a practical one.

The merging of railroad properties into a single fee ownership vested in one corporation makes them thereafter a unit in this respect. Bringing them together in the twofold tenure of fee in part and lease in part leaves still in law two distinct units *owned* by two distinct parties. Congress has made this distinction in connection with its requirement that the Commission shall prepare and adopt a plan for the consolidation of railway properties.

Therefore the courts cannot legislate the distinction out of existence. The distinction certainly exists at law, and is also a very practical one, and it is for Congress alone to determine whether the same shall be recognized from the standpoint of delegating to the Commission the power by which in the one case it is authorized to permit the acquisition of control by carriers of each other's properties and in the other case the consolidation of such properties into one corporation for ownership, management, and operation.

VI.

The plaintiffs' right to equitable relief is barred because of their laches shown on the face of their bill.

The order of the Commission was entered on May 16th, 1922. The plaintiffs allege upon information and belief that immediately upon the publication of the deci-

sion, report and order of the Commission and prior to July 13th, 1922, the Central acquired control of the River Road by the purchase of the capital stock thereof; the River Road acquired control of the Junction properties by lease; and the Central and River Roads have continually operated the said railroad properties as an integral part of and for the benefit of the New York Central System of railroads.

Furthermore the plaintiffs necessarily knew of the acquisition of control above alleged, for they aver that it has resulted in a loss to them of competitive tonnage amounting in revenue to $10,000,000 annually.

The bill in equity and the report of the Commission attached as an exhibit to the bill show that the purchase price of the stock of the River Road was $750,000. and that the annual rental to be paid for the lease of the Junction properties was $2,000,000., payable in quarterly instalments of $500,000. each, at the expiration of each quarter year of the term, except that the first two installments were to be for $250,000. each.

The plaintiffs with knowledge of this situation have delayed almost a year before filing their bill seeking to have the order of the Commission annulled and the transactions consummated pursuant to its authority set aside and enjoined.

Such circumstance is evidence of laches on their part, for with full knowledge of what was to be expected upon the entry of the order of the Commission they have silently waited watching for a year the development of events that have made impossible the restoration of the *status quo*. They knew that the purchase price of the

stock was presumably paid upon the acquisition of the same by the Central, and they were bound to know that as soon as the lease was executed the quarterly rental payments were required to be made as specified in the lease. In calling attention to these facts it is to be remembered that the capital stock of the River Road was purchased and the lease of the Junction properties was made to the River Road under color of authority derived from a Government body. The complaint of the bill is not that the Commission was unauthorized by statute to make orders of authorization and approval of the character of that entered by it on May 16th, 1922, but that the facts show that the Commission's authorization in such case was defective. The defendant railroad companies were therefore entitled to proceed without criticism under Government sanction presumably valid. It has been held that even a state, having delayed without a word of protest or remonstrance until a party acting upon a not unreasonable construction of a public grant has expended a large sum of money in the construction of a public work in the confidence that it possessed all requisite legislative authority, will be refused the aid of a court of equity to attack the validity of its grant. The following cases so hold:

Commonwealth v. *Phila. B. & B. M. Tpk. Co.*, 153 Pennsylvania 47 (25 Atl. Rep. 1105).

State v. *Janesville Water Power Co.*, 92 Wisconsin 496 (66 N. W. 512).

United States v. *Willamette V. & C. M. W. R. Co.*, 54 Fed. Rep. 807.

People v. *Pullman Palace Car Co.*, 175 Illinois 125.

If the state would be estopped under the circumstances above referred to how much more true it is that private parties guilty of a similar neglect would be barred from questioning the existence of the franchise or license derived from the state. It is a familiar rule of equity that equity aids the vigilant and not the sleepy. If the order of the Commission, made May 16th, 1922, violates any rights of the plaintiffs they knew this fact at the time the order was entered. The wrong complained of is that the Commission's order has resulted in depriving and in continuing to deprive them of business. They appeared before the Commission and urged their rights, and notwithstanding that the Commission denied their asserted rights, they stood by and allowed the order of the Commission to be carried out. They made no effort to seek relief in the courts until almost a year after the entry of the order, knowing that large sums of money were being, or would be, spent on the faith of the order. They failed to notify the defendant railroad companies that they would seek relief from the order of the Commission, or that they would, if the defendants acted under its order seek the aid of a court of equity to set aside any acts taken in pursuance of the same.

Under the facts thus disclosed by the Bill of Complaint the plaintiffs were obviously required to act promptly if they were to be entitled to act at all.

In *Sullivan* v. *Portland etc. R. R. Co.* 94 U. S. 806, at page 811, it is said:

> "Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is re-

quired; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statuable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence and to decide accordingly."

To the same effect is *Galliher* v. *Cadwell*, 145 U. S 368. In this case the court, after reviewing the authorities, said:

> "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the *inequity of* permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

In *New York City* v. *Pine*, 185 U. S. 93, the court held that riparian owners who had waited two years after the commencement by the City of the construction of a dam, by which waters of a river were diverted from flowing through their lands, were barred by laches from enjoining the construction of the dam.

In *Venner* v. *Chicago City Railway Co.*, 236 Illinois 349, the right of a stockholder who failed to bring suit to set aside acceptance by the company of an invalid ordinance until six months after the passage of the ordinance, was denied on the ground of laches.

In *Marks* v. *Merrill Paper Co.*, 203 Fed. Rep. 16, the court held that a minority stockholder, who delayed for nearly a year in instituting suit to set aside the sale of the corporation's assets to another company, was barred by laches.

In *Wright* v. *Tacoma Gas & Elec. Light Co.*, 101 Pacific 865, the court refused to permit a stockholder to set aside a sale by a corporation of all its franchises and property where he delayed in bringing an action for six months.

In *Hill* v. *Atlantic & N. C. R. R. Co.*, 145 N. C. 539 (55 S. E. 854), a stockholder who failed to bring action to set aside a lease of a railroad until 13 months had elapsed, was held barred by his laches.

See, also, *U. S. Trust Co.* v. *Chicago Terminal Transfer R. Co.*, 188 Fed. Rep. 292.

The foregoing authorities fully support the proposition that under the circumstances of the present case the delay by the plaintiffs of almost a year before bringing their action should bar them from obtaining any relief in a court of equity.

WHERE LACHES OF THE PLAINTIFFS IS SHOWN ON THE FACE OF THE BILL IT MAY BE TAKEN ADVANTAGE OF BY DEMURRER OR BY ITS EQUIVALENT, A MOTION TO DISMISS THE BILL.

Maxwell v. *Kennedy*, 8 Howard 210.
Speidel v. *Henrici*, 120 U. S. 377.
Venner v. *Chicago City Railway Co.*, 236 Illinois 349.

VII.

None of the objections made in the Bill to the validity of the Commission's order based upon an alleged want of regularity in procedure is well taken. Such objections are all frivolous in character.

(1) Exception is taken to the fact that the order of the Commission was entered pursuant to the application alone of The New York Central Railroad Company. It is claimed that the order is void in that no application was made to the Commission by either the River Road or the Junction seeking approval and authorization, and a certificate of public convenience and necessity with respect to the proposed lease of the Junction properties to the River Road. This objection is addressed to a question of procedure entirely within the control of the Commission.

Paragraph (19) of Section 1 provides that "The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe", and paragraph (2) of Section 5 provides that "the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations * * * as shall be found by the Commission to be just and reasonable in the premises."

In the present case the New York Central sought control of both the River Road and Junction properties. It proposed to acquire this control by the purchase of all of the stock of the River Road and by then causing to be leased to the River Road the Chicago Junction

properties. Thus the New York Central was the sole party substantively interested in both transactions. There is therefore no reason why it alone could not make the application. But, be this as it may, the bill of complaint shows that both The Chicago River and Indiana Railroad Company and The Chicago Junction Railway Company were represented by counsel and filed briefs and took part in the proceeding before the Commission. These companies are not raising any objection on the ground that they were not named in the application. Having submitted to the jurisdiction of the Commission even they could not now complain of the action of the Commission on the ground that the application was not made in their name. Such being the case the interveners in the proceeding before the Commission have no cause of complaint.

In *United States* vs. *Merchants' etc. Association*, 242 U. S. 178, it was held that an application by a carrier under Section 4 could be waived. The court said:

> "Unless formal application be an indispensable prerequisite to the exercise by the Commission of the power granted by the Fourth Section, its absence or a defect in it could be waived; and it would be waived by the filing of tariffs under the order entered. For the order is permissive merely. The carrier is the only necessary party to the proceeding under Sec. 4."

If it was necessary for The Chicago River and Indiana Railroad Company and The Chicago Junction Railway Company to join in the application they waived it by appearing before the Commission, and by making the sale of the stock and the lease.

Any attack by these plaintiffs against the order of the Commission on the ground that the application was not joined in by the proper parties is frivolous.

(2) Exception is taken to the fact that the Commission prefaced its finding that the acquisition of control approved by it will be in the public interest with the words "Subject to the observance of the above conditions" being certain conditions enumerated in its report.

Presumably it is intended to argue that the prescription of conditions negatives the Commission's finding that the acquisition of control authorized by the Commission will be in the public interest.

The logic of the point thus made is not perceptible, for the Commission has authority by order "to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." It thus follows that the Commission is entitled to define the nature of the transaction that would be in the public interest, circumscribed in such manner as it shall see fit, and to authorize the same to be consummated.

(3) It is asserted that the order of May 16th, 1922, is null and void because it did not prescribe the day upon which the same should take effect, as required by paragraph (2) of Section 15 of the Interstate Commerce Act, which provides that "Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified

period of time, according as shall be prescribed in the order, etc."

The above quoted provision obviously applies only to mandatory orders and would not have appropriate application to a permissive order containing a certificate of public convenience and necessity or approving and authorizing an act sanctioned under paragraph (2) of Section 5. The object of providing a period of thirty days before an order of the Commission shall become effective was of course, intended to give a reasonable time to the parties subject to its mandate to readjust affairs to meet its requirements. Since a permissive order does not call for an enforcement of its terms there is no occasion to require that it shall not become effective until a day certain. In any event, if the parties to whom such order is addressed take no exception to its form the plaintiffs certainly have no right to complain of the same.

(4) It is stated that the order insofar as it purports to approve and authorize the leasing of the properties of the Junction to the River Road is unlawful and void in that no lease of such railroad properties executed by the parties has been submitted to, or approved by, the Commission.

The Act makes no such requirement; the Commission is only interested in imposing upon the transaction such terms and conditions as are necessary to protect the public interest, or the public necessity and convenience. It is not called upon, and has no right to fix the terms of the lease in any other respect. Furthermore the application, report and order show what the substantial terms of the lease are. This is all that is necessary.

Again it should be said that the plaintiffs cannot complain because the lease itself was not filed with, or approved by, the Commission. They cannot intermeddle in the affairs of the lessor or lessee.

For the reasons heretofore assigned it is urged that the decree of the court below denying the motion of the plaintiffs for an interlocutory injunction and dismissing the bill of complaint in the above entitled cause be affirmed.

Respectfully submitted,

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The New York Central Railroad Company,
and The Chicago River and Indiana
Railroad Company.